TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 147.

NATHAN MYRICK AND REBECCA MYRICK, PLAINTIFFS IN ERROR,

vs.

BENJAMIN THOMPSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 11, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of judgment in a plea which is in the said supreme court before you, between Benjamin Thompson, plaintiff, and Nathan Myrick and Rebecca E. Myrick, his wife, defendants, a manifest error hath happened, to the great damage of the said Nathan Myrick and Rebecca E. Myrick, his wife, defendants, as they allege, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, directly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the ninth day of October next, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-
2 preme Court of the United States of America, this 30th day of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundredth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

GEO. L. OTIS & C. K. DAVIS,
Att'ys for Nathan Myrick and Rebecca E. Myrick, his wife.

The answer of the judges of the supreme court of the State of Minnesota and of the supreme court of said State in the within writ mentioned.

The record of proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned in these certain papers and schedule annexed, as within it is commanded, together with the original citation and proof of service thereof.

Witness the Hon. James Gilfillan, the chief justice of the supreme court of the State of Minnesota, and the seal of said court, this 5th day of August, A. D. 1876.

[SEAL.] SAM. K. NICHOLS,
Clerk of the Supreme Court of the State of Minnesota.

3 STATE OF MINNESOTA,
County of Ramsey, ss:

Hiler H. Horton, of said county, being duly sworn, says that on the 1st day of July, A. D. 1876, at eleven o'clock a. m., he duly served the within citation on the said plaintiff, Benjamin Thompson, by handing to & leaving with him, and with E. C. Palmer, his attorney, and with each of them personally, a true & correct copy thereof at the city of Saint Paul, in said county.

H. H. HORTON.

Sworn & subscribed to before me July 1, 1876.

[SEAL.] CHA'S E. OTIS,
Notary Public, Minn.

4 UNITED STATES OF AMERICA, *ss:*

To Benjamin Thompson:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Nathan Myrick and Rebecca E. Myrick, his wife, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment to said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. James Gilfillan, chief justice of the supreme court of Minnesota, this 30th day of June, A. D. 1876.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of the State of Minnesota.

(Indorsed:) 2113. Supreme court. Nathan Myrick et al., pl'ff in error, vs. Benj. Thompson, def't in error. Citation.

I hereby admit due service of the within citation this day of June, 1876.

Att'y for said Def't in Error.

Filed July 6th, 1876.

SAM. H. NICHOLS, *Clk.*

MORRIS LAMPREY, C. K. DAVIS, & GEO. L. OTIS,
Att'ys for Pl'ff in Error.

5 *Assignment of errors.*

United States Supreme Court.

NATHAN MYRICK AND REBECCA E. MYRICK,
pl'ffs in error,
ag'st
BENJAMIN THOMPSON, DEF'T IN ERROR.

The plaintiffs in error make the following assignment of errors appearing in the record, judgment, and proceedings of the court below, viz:

For that the defendant in error and pl'ff below has no ground of action except upon the agreement set out in his complaint, and said agreement is void under the act of Congress approved July 17, 1854, and under the treaty of 1830 made at Prairie du Chien. (See U. S. Statutes, vol. 7, p. 330, & vol. 10, p. 304.) Nevertheless the court below held and decided that the said agreement was not void under said act and treaty.

Wherefore the plaintiffs in error pray that said judgment may be reversed.

MORRIS LAMPREY,
C. K. DAVIS,
GEORGE L. OTIS,
Attorneys for Plaintiff in Error.

(Indorsed:) 2113. State of Minnesota, supreme court. Benjamin Thompson ag'st Nathan Myrick et al. Writ of error from U. S. Supreme Court and assignment of errors. Filed July 1st, 1876. Sam. H. Nichols, clerk.

6 STATE OF MINNESOTA,
Supreme Court, ss:

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing are full and true copies of complaint, answer, case, decision, judgment, stipulation, syllabus, and opinion, notice of taxation of costs, &c., copy of minutes of argument, copy of order for judgment, transcript of judgment, judgment-roll, petition for writ of error, writ of error and assignments of errors, bond for costs, citation and copy lodged for defendant in error, and of the entire record, filed and entered in the within entitled action, as appears from the records and files in my office.

Witness my hand and seal of said court at S't Paul, State of Minnesota, this 5th day of August, A. D. 1876.

[SEAL.] SAM. H. NICHOLS, *Clerk.*

7 STATE OF MINNESOTA,
Supreme Court, ss:

I, Sam. H. Nichols, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the original record and judgment-roll in the within entitled action remaining on file and of record in my office, and that the same is a true and authentic transcript thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court, at the capitol, in the city of S't Paul, this 5th day of August, A. D. 1876.

[SEAL] SAM. H. NICHOLS, *Clerk.*

8 STATE OF MINNESOTA,
Supreme Court:

BENJAMIN THOMPSON
vs.
NATHAN MYRICK AND REBECCA E. MYRICK, his wife.

To the honorable James Gilfillan, chief justice of said court:

The petition of Nathan Myrick and Rebecca E. Myrick, his wife, states that in the above-entitled action there was drawn in question in this court the construction of a statute and treaty of the United States, and that the final decision and judgment of this court was against the title, right, privilege, and exemption specially set up and claimed by your petitioners under said statute and treaty.

Wherefore, your petitioners pray that your honor will ex-
9 amine the record of this court in that behalf, and allow to your petitioners a writ of error, in order that the said judgment and record may be brought before the Supreme Court of the United States.

GEO. L. OTIS AND C. K. DAVIS,
Att'ys for Nathan Myrick and Rebecca E. Myrick, his wife.

The writ of error hereinbefore prayed is hereby allowed.
Dated St. Paul, Minn., June 30th, 1876.

JAMES GILFILLAN,
Chief Justice Sup. Court Minn.

(Indorsed:) 2113 with 1602. State of Minnesota, supreme court. Benj. Thompson vs. Nathan Myrick et al. Petition for writ of error. Filed July 1st, 1876. Sam. H. Nichols, clerk.

10 Supreme Court of the United States.

BENJAMIN THOMPSON
against
NATHAN MYRICK AND REBECCA E. MYRICK, his wife.

Know all men by these presents, that we, Nathan Myrick and Rebecca E. Myrick, his wife, defendants above named, and W'm Crooks and J. C. McCarthy, of the city of St. Paul, in the State of Minnesota, are held and firmly bound unto Benjamin Thompson, plaintiff above named, in the sum of five hundred dollars, to be paid to the said obligee and his executors and administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and adminis-
11 trators, firmly by these presents, sealed with our seals, and dated this thirtieth day of June, 1876.

Whereas the above-named Nathan Myrick and Rebecca E. Myrick have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such, that if the above-named Nathan Myrick and Rebecca E. Myrick shall prosecute their said writ of error to effect, and answer all costs, if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

NATHAN MYRICK. [SEAL.]
REBECCA E. MYRICK. [SEAL.]
W'M CROOKS. [SEAL.]
J. C. McCARTHY. [SEAL]

Executed in our presence:
H. P. GOODENOW,
CHA'S E. OTIS.

12 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 30th day of June, A. D. 1876, before me personally came Nathan Myrick and Rebecca E. Myrick, his wife, and W'm Crooks and J. C. McCarthy, to me well known to be the identical persons who executed the foregoing obligation, and they and each of them duly acknowledge the same to be their and each of their free acts and deed.

Witness my hand and notarial seal the day and year last aforesaid.

[SEAL.]

CHA'S E. OTIS,
Notary Public, Minnesota.

STATE OF MINNESOTA,
County of Ramsey, ss:

W'm Crooks and J. C. McCarthy, of said county and State, be-
13 ing duly sworn, doth each for himself depose and say, that he is a resident and freeholder of the State of Minnesota, and one of the obligors in the foregoing bond; that he is worth the sum of one thousand dollars, over and above all debts and liabilities and exclusive of property exempt from levy and sale on execution.

W'M CROOKS.
J. C. McCARTHY.

Sworn and subscribed to before me the 30th day of June, A. D. 1876.
[SEAL.] CHA'S E. OTIS,
Notary Public, Minnesota.

(Indorsed:) 2113 with 1602. State of Minnesota, supreme court. Nathan Myrick et al., pl'ff in error, vs. Benjamin Thompson, def't in error. Bond for costs.

I hereby approve of the above bond.
Dated June 30th, 1876.

JAMES GILFILLAN,
Chief Justice.

Filed July 1st, 1876.

SAM. H. NICHOLS, *Clerk.*

14 STATE OF MINNESOTA,
County of Ramsey:

District court, second district.

BENJAMIN THOMPSON
against
NATHAN MYRICK AND REBECCA E. MYRICK.

Complaint.

Said plaintiff complains of said defendants, and says that heretofore, to wit, on or about the 6th day of September, A. D. 1858, and prior to that time, the said defendant, Nathan Myrick, was the attorney in fact, duly constituted, of one Francis Longie, and Joseph Longie, son of the said Francis, and was duly authorized, among other things, to locate certain half-breed scrip, hereinafter more particularly described, and was also at and during the same period the attorney in fact, duly constituted, of one Francis Roi, and Henry Roi, son of the said
15 Francis, and was duly authorized, among other things, to locate certain other half breed scrip, hereinafter more particularly described, and was desirous of discovering valuable lands, situated in the State of Minnesota, whereon to locate the said half breed scrip, and all of the same, or, in default thereof, of disposing of said half-breed scrip in such manner as to secure the interests of said owners, in pursuance of the said authority, and in discharge of the duty imposed upon him, the said Nathan Myrick, as attorney in fact of the said parties, but was unable to find such lands, or locate said half-breed scrip, except as hereinafter stated.

That at and prior to said September 6th, A. D 1858, the said plaintiff had knowledge, and was, by himself, his agents, servants, and employees, in actual possession of the lands hereinafter described, and had made valuable improvements thereon, and been at great expense thereabout, in order to secure the title thereto in himself, the said plaintiff.

16 That on or about the said 6th day of September, A. D. 1858, the said plaintiff and defendant, Nathan Myrick, for the purpose of securing the interests of all said parties, entered into and duly executed an agreement in the words and figures following, that is to say:

Articles of agreement made and concluded this sixth day of September, 1858, between Nathan Myrick, of St. Paul, Minnesota, of the first part, and Benjamin Thompson, of the same place, of the second part.

Whereas the said Nathan Myrick is the attorney in fact of said Francis Longie, and Joseph Longie, his son (a minor, under the age of

fourteen years), by virtue of certain powers of attorney duly executed by the said Francis Longie, on behalf of himself and his said son, dated July 1st, 185[illegible], authorizing the said Nathan Myrick, among other things, to locate certain half-breed scrip, issued by the Commissioners of Indian Affairs of the United States, in accordance with the pro-
17 visions of the act of Congress approved July 17th, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half breeds or mixed bloods of the Dakota or Sioux Nation of Indians, and for other purposes," to the said Joseph Longie, numbered 353, B, C, D, and E, for 440 acres; and also is the attorney in fact of Francis Roi, and Henry Roi, his son, a minor, under the age of fourteen years, by virtue of a certain power of attorney duly executed by the said Francis Roi on behalf of himself and his said son, dated July 20th, 1857, authorizing the said Nathan Myrick, among other things, to locate certain other half-breed scrip, issued by the Commissioners aforesaid, in accordance with the act aforesaid, to the said Henry Roi, numbered 481, A, B, C, D, and E, for 480 acres.

And whereas the said Nathan Myrick has placed the said scrip and the said powers of attorney in the hands of the said Benjamin
18 Thompson, with a view to the location thereof for the benefit of the said minor: Now this agreement witnesseth:

That the said Nathan Myrick, in consideration of the premises, and of the sum of one dollar to him in hand paid by the said Benjamin Thompson, party of the second part, the receipt whereof is hereby acknowledged, agree with the said party of the second part that he will, upon the location of the said scrip, secure the title to the land whereon the same may be located, to be lawfully vested in the said Benjamin Thompson.

And the said Benjamin Thompson, in consideration of the premises, and the faithful fulfillment of the said agreement of the said Nathan Myrick, agree with the said party of the first part to pay him the sum of twenty-eight hundred dollars in one year after date, according to the condition of his promissory note to the said Nathan Myrick, bearing even date with this agreement, and to secure the payment of the said sum of twenty-eight hundred dollars upon the land so to be lo-
19 cated, as soon as he shall acquire the title to the same as aforesaid, or to secure the same otherwise upon the acquirement of such title to the satisfaction of said Nathan Myrick.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

NATHAN MYRICK. [SEAL.]
BENJAMIN THOMPSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. HOLLINSHEAD.

That the said agreement was duly delivered, and the half-breed scrip and power of attorney therein mentioned were delivered by the said Nathan Myrick, for the purposes stated, and said plaintiff then and there executed and delivered to said Myrick his, said plaintiff's, promissory note for $2,800, as mentioned in said agreement.

That upon the execution and delivery of the said agreement, the said plaintiff, to whom the said half-breed scrip and power of attorney therein mentioned had been and was delivered, proceeded to and
20 did locate the said scrip upon the lands so known to and occupied by him as aforesaid, which said lands are described as follows

viz: Lots two, three, and four, in section five; lot one in section five; lots one, six, and seven in section six; lots one, two, and three in section eight; lots one, two, and three in section nine; all in township forty-eight, north of range sixteen west, and were located and entered on the 8th day of February, A. D. 1859, by said plaintiff, in the name of the said Henry Roi; also, on the 17th day of January, A. D. 1861, the said plaintiff, pursuant to said agreement, located other of the said scrip in the name of the said Henry Roi upon lots five and six in section ten, and lot six in section fifteen, all in township forty-eight, range sixteen; all which locations and entries so made by said plaintiff with said scrip in the name of the said Henry Roi covered, comprised, and included five hundred and fourteen and 27-100 acres of land; the same being
34 and 27-100 acres more than the said scrip called for, or than
21 could be secured and paid for by the said 480 acres of scrip received of the said Myrick, and belonging to the said Henry Roi, and that such excess of land was at said time of entry paid for by the said plaintiff in cash, at the rate of one dollar and twenty-five cents per acre.

That on or about the said 8th day of February, 1859, the said plaintiff, in fulfillment of said agreement, did locate the scrip received of said Myrick, in the name of Joseph Longie, upon certain other lands known to and occupied by said plaintiff as aforesaid, and did enter the same at the proper office, which said lands are described as follows: Lot five in section five; lots two, three, four, and five in section six; lots four, five, six, and seven in section eight; lots five, six, seven, and eight in section nine; all in township forty-eight, of range sixteen west, in said State of Minnesota; and which locations and entries so made by said plaintiff in the name of the said Joseph Longie covered, com-
22 prised, and included four hundred and seventy-two and 82-100 acres of land, the same being 32 and 82-100 acres more than the said scrip called for, or than could be secured and paid for by the said 440 acres of scrip received of the said Myrick, belonging to the said Joseph Longie, and that such excess of land was at said time of entry paid for by the said plaintiff in cash, at the rate of one dollar and twenty-five cents per acre.

That none of the said lots of land so entered by said plaintiff in the names of Henry Roi and Joseph Longie, as stated aforesaid, contained or comprised the usual number of acres required by the mode of survey adopted by the Government of the United States, but were known as lots or fractional pieces, and could not be entered with and by said half-breed scrip except upon the terms and conditions aforesaid; that is to say, that said plaintiff should pay for the excess over which said scrip would pay for in cash at the regular government rate per acre,
23 as stated aforesaid; and in order to secure the title to said lands, and obtain a number of acres equal to the number of acres of said scrip, said plaintiff was obliged to and did enter said fractional lots and pay for said excess in cash; that, in consequence thereof, the said Henry Rio obtained the title of and to 34 and 27-100 acres of said land over and above the number of acres he was entitled to, and the said Joseph Longie obtained the title of and to 32 and 84-100 acres of said land more than he was entitled to, and in each case at the expense and with the money of said plaintiff; that said plaintiff paid all the fees and expenses necessary to be paid in making said entries and in locating the said scrip, all which amounted to the sum of at least five hundred dollar, exclusive of the amount paid for the excess of land set forth aforesaid.

And said plaintiff alleges that by reason of the said acts of the
24 said plaintiff, and the payments made and the expenses incurred by him, the said Henry Roi acquired the title in fee of and to all and singular the lands hereinbefore described as entered in his name; and the said Joseph Longie acquired the title in fee of and to all and singular the lands hereinbefore described as entered in his name, by grant from the Government of the United States.

Said plaintiff further alleges that after said half-breed scrip had been located upon and the said Henry Roi and Joseph Longie had acquired the title to the lands described aforesaid, the said Nathan Myrick, without the knowledge or consent of this plaintiff, and with the design and intent to cheat and defraud him, said plaintiff, and in fraud of the said agreement between said parties, and of the rights of said plaintiff thereunder, did, acting as guardian of the said Joseph Longie, by his deed, bearing date the 14th day of January, A. D. 1860, convey to one
25 George Magruder all the said lands above described belonging to and entered in the name of the said Joseph Longie, and all the right, title, interest, claim, and demand of the said Joseph Longie, his heirs and personal representatives and assigns in and to all and singular the said lands.

That said deed purported to be made upon a sale of said lands to the said George Magruder, under and by virtue of a license issued by the probate court of the county of Ramsey and State of Minnesota, upon petition therefor by the said Nathan Myrick, guardian as aforesaid, and contained the usual recitals and covenants, and was, on the 21st day of May, A. D. 1860, at 6.30 p. m., filed and recorded in the office of the register of deeds of the county of Carlton, where said lands are situated, and recorded in book B of deeds, on pages 548 and 549.

That with the same fraudulent intent and design, and in fraud of the rights of said plaintiff as secured to him by said instrument, the
26 said Nathan Myrick, acting as guardian of the said Henry Roi, by his deed, bearing date the same 14th day of January, A. D. 1860, convey' to the same George Magruder all and singular the said lands hereinbefore described, belonging to and entered in the name of the said Henry Roi by the said plaintiff on the 8th day of February, A. D. 1859, and all the right, title, interest, claim, and demand of the said Henry Roi, his heirs and personal representatives, in and to all and singular the said lands; that said deed purported to be made upon a sale of the said land to the said George Magruder, under and by virtue of a license issued by the probate court of the county of Ramsey and State of Minnesota, upon petition therefor by the said Nathan Myrick, guardian as aforesaid, and contained the usual recitals and covenants, and was, on the same 21st day of May, A. D. 1860, at 6.30 p. m., recorded in the office of the said register of deeds of said county
27 of Carlton, where said lands are situated, in book B of deeds, on pages 549 and 550.

And, upon information and belief, said plaintiff alleges that said sale of the said lands, and each of the same, was made by the said Nathan Myrick without any of the requirements of law being complied with; that the said George Magruder was not present by himself or any agent at the place of sale of said lands, and made no bid therefor or for any of the same, and paid no money or other valuable thing on account of said pretended sales, or either of the same, of the said lands or any part thereof; that all that was done in and about the said pretended sales, and every of them, was done by the said Nathan Myrick fraudulently to cheat and defraud said plaintiff, as stated aforesaid.

Said plaintiff further alleges that on or about the sixteenth day of January, A. D. 1860, the said George Magruder, by his deed of
28 that date, duly executed, conveyed to the said Nathan Myrick, his heirs and assigns, in fee, all and singular the said lands previously conveyed to the said Magruder by said Nathan Myrick, guardian, for the pretended consideration of $1,200, which said deed was, on the 21st day of May, A. D. 1860, at 6.30 p. m., duly recorded in the register of deeds' office mentioned aforesaid; that said Nathan Myrick paid no money or other valuable thing, or any consideration whatever, for or on account of the said conveyance, but procured the same to be made to him in order to cheat and defraud this plaintiff and deprive him of his rights under said agreement, as hereinbefore and hereinafter stated.

That afterwards, and before the commencement of this action, with the sole object, design, and intent to cheat and defraud this plaintiff, and to deprive him of his just rights under said agreement, said Nathan Myrick, and said Rebecca E. Myrick, who was and is the wife of
29 the said Nathan, conveyed by deed in due form all and singular the said land hereinbefore described as conveyed by the said George Magruder to the said Nathan Myrick, to Henry M. Rice, his heirs and assigns; and that afterwards, and before the commencement of this action, the said Henry M. Rice and Matilda W. Rice, his wife, by their deed in due form, conveyed all and singular the said lands to Theodore Borup, his heirs and assigns, and thereafter, and before the commencement of this action, the said Theodore Borup and Elizabeth A. Borup, his wife, by deed executed in due form, conveyed all and singular the said lands hereinbefore described to the said defendant, Rebecca E. Myrick, wife of the said Nathan, her heirs and assigns, forever; that each of said deeds from Myrick and wife to Rice, from Rice and wife to Borup, and from Borup and wife to Rebecca E. Myrick were duly recorded in the register of deeds' office of the proper county.

30 And plaintiff alleges that said Rebecca E. Myrick took said title to said lands, and all and singular thereof, with full knowledge of the rights of this plaintiff under said agreement in respect thereto, and without due payment of any consideration therefor, and in aid of the purpose, intent, and design of her said husband to cheat and defraud this plaintiff, as stated herein; that said lands, and all and singular thereof, since the entry thereof by said plaintiff, have been possessed, controlled, and managed by the said Nathan Myrick, and he has caused and procured each of the conveyances thereof, mentioned aforesaid, to be made for his own benefit, and to carry out and complete his purpose to cheat and defraud this plaintiff, as stated herein.

Said plaintiff further alleges that on or about the 26th day of December, A. D. 1866, the said Nathan Myrick, in order further to carry out and consummate his said fraudulent intent and design, procured the
31 said Henry Roi to execute his deed of and to the said lands, entered by this plaintiff in the name of the said Henry Roi, whereby, for the pretended consideration of fifty dollars, the said Henry Roi conveyed all and singular the said lands to the said Rebecca E. Myrick, her heirs and assigns, forever, which said deed was duly recorded in the office of said register of deeds of the said county, on the 14th day of January, A. D. 1867, at six o'clock p. m.; that no consideration in fact for the execution of said deed was paid by the said Rebecca E. Myrick, or received by the said Henry Roi.

That on or about January 3d, 1867, the said Nathan Myrick, in order further to carry out his said fraudulent design, and prevent said plain-

tiff from securing his just rights under said agreement, procured the said Joseph Longie to execute, and the said Joseph Longie did execute, a deed of and to the land entered by said plaintiff in the
32 name of the said Joseph Longie, as stated aforesaid, a true copy of which said deed is hereto attached, marked "A," and made part of this complaint; that said deed was duly recorded in the office of said register of deeds on the 17th day of January, A. D. 1867, at six o'clock p. m.; that the consideration named in said deed is $500; but said plaintiff alleges that no consideration in fact was paid therefor by the said Rebecca E. Myrick, grantee therein, or received by the said Joseph Longie.

That at and before the execution, respectively, of said last two deeds, the said Henry Roi and Joseph Longie had each attained his majority, and was of lawful age to execute such deed; that each of said instruments last named, and each and every deed or instrument of conveyance hereinbefore referred to, was made, executed, and recorded without the knowledge or consent of said plaintiff, and in fraud of his rights in
33 said lands under the said agreement between him and said Nathan Myrick herein set forth.

And said plaintiff alleges that the said Rebecca E. Myrick now holds the title of and to all and singular the said lands so entered by this plaintiff under said agreement with the said Nathan Myrick, and without having paid any consideration therefor, and in fraud of the just rights of this plaintiff, except certain undivided interests in and to said lands heretofore conveyed to sundry parties, as hereinafter stated.

That the said Nathan Myrick and Rebecca E. Myrick, on or about the 23rd day of January, A. D. 1867, by deed in due form, conveyed to one William Branch, his heirs and assigns, one equal undivided three-fourths part of, in, and to all and singular the said lands, for the consideration of seven thousand dollars paid to said grantors; which said deed was duly recorded in the office of the register of deeds of said county of Carlton, on the 28th day of January, A. D. 1867, at five o'clock p. m.

34 And said plaintiff alleges that a part of said lot one, section eight, and town forty-eight, range sixteen, was, on or about June 14th, 1870, surveyed, platted, and included within the limits of the town of Thompson, and now forms part of said town, as appears by the records in the office of the register of deeds of said county of Carlton.

That on or about the 11th day of July, 1870, the said Nathan Myrick and Rebecca E., his wife, by quit claim deed, duly executed, conveyed to the Western Land Association, a corporation duly created and capable of holding and conveying lands, and to its successors and assigns, all that part of lot one, section eight, and town forty-eight, range sixteen, that lies north and east of the line of Vermillion street, in the town of Thompson, according to the recorded plat thereof, which said deed was recorded in said register of deeds' office of said Carlton County on the 23rd day of July, A. D. 1870.

35 That on the fifteenth day of July, A. D. 1870, the said Western Land Association, by its deed of that date duly executed, conveyed to the said Nathan Myrick, his heirs and assigns, a portion of said lot one, section eight, town forty-eight, range sixteen, described as follows: Lots 1, 5, 6, 13, 18, 19, and 20, in block 1; lot 8, in block 3; lots 26, 27, 33, 34, 35, 42, 43, 44, and 45, in block 5; all in said town of Thompson, according to the recorded plat thereof; that no consideration was, in fact, paid or received by either or any of the parties to said

last two deeds for the execution thereof; that said last named deed was duly recorded in said register's office on the 23rd day of July, 1870, at 4 o'clock p m.; and that said Nathan Myrick still holds the title of and to said lots last described in his own name.

And said plaintiff further alleges that after the location of said half-breed scrip, and the entry of said lands therewith, as stated afore-
36 said, and within the time specified in said agreement between him and the said Myrick, and at divers times thereafter, and before the commencement of this action, he, the said plaintiff, was ready, willing, and able to pay, and offered and tendered to said Nathan Myrick the sum of $2,800 and interest thereon, according to the conditions of the promissory note referred to in said agreement, and offered to secure the payment of said sum of $2,800 upon the said lands so located as soon as said plaintiff should acquire the title to the same, and offered to secure the same otherwise to the satisfaction of said Nathan Myrick, as stipulated in said agreement, and duly performed all the terms and conditions of the said agreement on his part to be performed, according to the tenor and spirit thereof, and demanded that said Nathan Myrick should duly fulfill the conditions of said agreement on his part to be performed, and that he secure the title to all and singular the
37 said lands to be lawfully vested in him, the said plaintiff, as said Myrick might and could have done lawfully then and there; but said Nathan Myrick wrongfully refused, and still refuses, and said defendants refuse, to fulfill said agreement or secure the title to said lands or any part thereof or any interest therein to said plaintiff, in fraud of his rights in that behalf, and contrary to equity and good conscience.

That said Nathan Myrick has received on account of the sale and conveyance of said undivided three-fourths interests in said lands, as stated aforesaid, the sum of, at least, seven thousand dollars, and has appropriated the same to his own use; that he has never returned or offered to return said promissory note, made and executed by said plaintiff as stated aforesaid, but still retains the same; that each of said defendants is insolvent and has no property except the property herein described, and except such as is exempt from levy and
38 sale on execution; and that said plaintiff will be greatly injured and be remediless in the premises, unless relief is granted him against said defendants, and each of them, as prayed herein.

And said plaintiff alleges that he is still able, ready, and willing to perform all and singular the agreements and covenants by him to be performed, as set forth in said instrument first herein set forth, and hereby specifically offers to perform the same as this court shall direct.

Wherefore said plaintiff demands the judgment and decree of this court against said defendants, and each of them, for a specific performance of said agreement entered into by and between said plaintiff and said Nathan Myrick, that said defendants be decreed to make conveyance to this plaintiff of one undivided fourth part of all the said lands first described herein as located and entered by said plaintiff, and the entire fee in all the lots last described herein, or that the decree of this
39 court shall stand in place thereof, and be effectual to carry the title thereto, and that said plaintiff have such further order, relief, or decree, as is consonant to equity and good conscience, and as to this court may seem meet.

BRISBIN AND PALMER,
Pl'ff's Attorneys.

STATE OF MINNESOTA,
Ramsey County, ss:

Benjamin Thompson came before me personally, and being first duly sworn, doth say that he is the plaintiff in the above entitled action; that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on his information and belief; and as to those matters that he believes it to be true.

BENJAMIN THOMPSON.

Subscribed and sworn to before me this 8th day of November, 1867.
[NOTARIAL SEAL.] U. L. LAMPREY,
Notary Public, Minn.

40 *Deed.*

This indenture, made this 3d day of January, in the year of our Lord one thousand eight hundred and sixty-seven, between Joseph Longie, a Sioux half-breed of the Sioux Nation of Minnesota and Dakota Territory, party of the first part, and Rebecca E. Myrick, of St Paul, Ramsey County, State of Minnesota, party of the second part, witnesseth:

That the said party of the first part, in consideration of the sum of five hundred dollars to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and does by these presents grant, bargain, sell and convey to the said party of the second part, her heirs and assigns forever, all those tracts or parcels of land lying and being in the the county of Carlton and State of Minnesota, described as follows, to wit:

Lots five (5), section five (5); lots two (2), three (3), four (4),
41 five (5), section six (6); lots four (4), five (5), six (6), seven (7), in section eight (8); lots five (5), six (6), seven (7), eight (8), in section nine (9); all in township forty-eight (48) north, of range sixteen west; containing 449 and 71-100 acres of land, be the same more or less.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining to the said party of the second part, her heirs and assigns forever. And the said Joseph Longie, party of the first part, does covenant with said party of the second part, her heirs and assigns, as follows: First, that he is lawfully seized of said premises; second, that he has good right to convey the same; third, that the same are free from all incumbrances; and fourth, that the said party of the second part, her
42 heirs and assigns, shall quietly enjoy and possess the same, and that the said party of the first part will warrant and defend the title to the same against all lawful claims.

In testimony whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

his
JOSEPH + LONGIE. [SEAL.]
mark.

Signed, sealed, and delivered in presence of—

her
ROSETTE + LONGIE,
mark.
EDWARD CONNOLLY.
N. MYRICK.

43 In the district court of the second judicial district of the State of Minnesota, for Ramsey County.

STATE OF MINNESOTA,
Ramsey County:

At a special term of the said court, held at said county on the twelfth day of January, A. D. 1867, Nathan Myrick appeared before said court, and being duly sworn by the judge of said court, in open court, did depose and say, that he is one of the subscribing witnesses to the deed hereto attached, dated the 3d day of January 1867, from Joseph Longie to Rebecca E. Myrick, for the lots five (5), in section five (5), lots two (2), three (3), four (4), five (5), in section six (6); lots four (4), five (5), six (6), seven (7), in section eight (8); lots five (5), six (6), seven (7), eight (8), in section nine (9); all in township forty eight (48) north,
44 of range sixteen (16) west, in the county of Carlton, State of Minnesota, as therein described; that said deponent is personally acquainted with the said Joseph Longie described in said deed, and was present at the execution of said deed, which took place on the third day of January, A. D. eighteen hundred and sixty-seven, at Cheyenne County, in Dakota Territory; that prior to the execution of said deed, the same was carefully read to the said Joseph Longie, and the contents thereof fully explained to him in presence of said deponent, and of Rosette Longie and Edward Connolly, the other subscribing witnesses; and that thereupon, after the same had been so read and explained to him, the said Joseph Longie did then and there sign the same with his mark, in presence of the said deponent and the said other subscribing witnesses, and at the same time declare said mark to be
45 his signature, and the seal opposite thereto to be his seal, and did, in the presence of said deponent and the other subscribing witnesses, execute and deliver the same as his free and voluntary act and deed.

And the said Joseph Longie at the time of so executing said deed was of the age of twenty-one years and over, and resides in said Dakota Territory, and without this State, and that he is not in this State; that the said Rosette Longie resides without this State and is not therein, and the said Edward Connolly near Fort Abercrombie; and that said deponent saw Rosette Longie and Edward Connolly, at the time of the execution of the deed aforesaid, subscribe their names as witnesses aforesaid, the said Rosette making her mark.

N. MYRICK.

Sworn to and subscribed before the said court the day and year
46 aforesaid by the said Nathan Myrick, whom I certify to be a competent witness to said deed, and the execution of which said deed I certify was duly proved in manner aforesaid.

W. WILKEN,
District judge second district of Minnesota.

STATE OF MINNESOTA,
Ramsey County, ss:

This is to certify that the execution of the deed hereto attached and within referred to was duly proved by Nathan Myrick, a competent witness thereto, before the district court of the second judicial district of the State of Minnesota, in open court at said Ramsey County, this twelfth day of , 1867, and that the said proof was taken before the

Honorable Westcott Wilken, judge of said court, whose genuine
47 signature appears to the jurat and certificate thereto, and is hereto attached.

In witness whereof I have set my hand and the seal of said court, this twelfth day of January, 1867.

[SEAL.] ALBERT ARMSTRONG,
Clerk of District Court, Second Judicial District,
Ramsey County, Minnesota.

48 *Answer.*

The defendants answer the plaintiffs complaint, viz:

I. They deny each and every allegation in said complaint contained, and every part thereof, except as hereinafter expressly admitted.

II. They admit the allegations contained in folios 1 and 2 of said complaint, and admit the articles of agreement set forth in folios 4, 5, 6, and 7 of said complaint, and admit that the scrip referred to in said agreement was located by said plaintiffs, pursuant to said agreement, upon the lands described in the complaint, and the making and delivery of the promissory note by the plaintiff to this defendant, N. Myrick, for $2,800, as in said agreement provided; but they deny that the
49 number of acres located in the name of Henry Roi was 514 and 27-100 acres, as in said complaint alleged, or any greater number of acres than 487 42-100 acres; and deny that the number of acres so located in the name of Joseph Longie was 472 82-100 acres, as in said complaint alleged, or any greater number of acres than 449 71-100 acres; and denies that the excess of the entries for which the plaintiff paid in money was 34 and 27-100 acres as to the said Roi entries, and 32 and 82-100 acres as to the said Loggie entries, as in said complaint alleged, but admits that there was an excess in the aggregate in both classes of entries amounting to 17 and 13-100 acres, and no more; and admit that the plaintiff paid for said excess the sum of $1.25 per acre in money; and admit that plaintiff paid the expenses of said loca-
50 tion and entries, but deny that the fees and expenses necessary to be paid in the premises amounted to the sum of $500, as in said complaint alleged, or to any greater sum than fifty dollars.

And they admit that said Roi and Longie respectively became vested with title in fee to the lands so entered in their respective names; and they admit the guardian sales and deeds of said lands, at the time in said complaint alleged, by this defendant, N. Myrick, as such guardian, to the said George Magruder, and the deeds by the said Magruder to the defendant, N. Myrick, and the record of said respective deeds, as alleged in the complaint; but they expressly deny that the same was done with any intent to cheat or defraud the plaintiff; and they allege that the said sales and deeds were so made with the express con-
51 sent of the plaintiff, and after and upon consultation with him had by the defendant, N. Myrick, for the sole purpose and object and upon the express understanding that the said premises might be conveyed by the defendants to the plaintiff, pursuant to the terms of said contract, as soon as the plaintiff could pay the said promissory note to the defendant, N. Myrick, which had fully matured at the time when said guardian's sales were so made and completed, and which said note the said plaintiff expressed himself unable to pay at that time.

That the defendant, N. Myrick, so made said sales as guardian of said minors, and was such guardian duly appointed by the probate court for the county of Ramsey, in this State; that he first obtained the usual

license from said court, authorizing him to make said sales, and
52 that said sales and conveyances were regularly made in pursuance of the statutes in such case made and provided, and said sales were duly confirmed, and said guardian's deeds were duly authorized by said court.

And the defendants admit the conveyance of said premises by them to the said Henry M. Rice, and allege that the said conveyance was made in the month of July, A. D. 1851, and the facts connected with said conveyance are as follows, viz: The defendant, N. Myrick, was during the years 1860 and 1861 in embarrassed circumstances and greatly in need of money wherewith to meet his pecuniary engagements, and repeatedly requested the plaintiff to pay the said note and take a conveyance of the said lands; that the plaintiff refused to pay said note or take said conveyance, alleging as a reason for such refusal that he was hard up and could not raise the money.

53 That said defendant being unable to get the matter closed with the plaintiff, and being pressed for money by his creditors and threatened with suits and litigation, and still hoping that the plaintiff would comply with said contract and pay his said note and take the said land, did, for the purpose of keeping said lands clear from judgments against himself and where they could be conveyed to the plaintiff, and without any consideration of value from the said Rice moving, convey the same to the said Rice, with an understanding and agreement between the said Rice and said defendant that the said lands should be held by the said Rice subject to the order of said defendant, and the said Rice continued to so hold the same subject to the order of said defendant until he conveyed the same to the said Borup, as hereinafter stated.

54 The defendants further allege, that the defendant, N. Myrick, so held said lands for the plaintiff's benefit, ready and willing at all times to convey the same to the plaintiff on payment of the said note and interest, until some time in the fall of the year 1862.

That the said plaintiff at the date last aforesaid had become, and for a long time before that time had been insolvent, and to the repeated and urgent request of said defendant that he should take said lands and pay said note, the plaintiff expressed himself as still unable to complete said purchase, and as being now ready and willing to abandon said purchase and give up said lands; that said lands were in fact at this time of little value, and were and had been ever since the same were entered as aforesaid, not worth to exceed two and $\frac{50}{100}$ dollars per acre;
55 that the said defendant had been compelled to pay out large sums of money for the annual taxes and assessments thereon, and the said note against the said plaintiff was wholly worthless by reason of the insolvency of the said plaintiff.

That in view of all the facts, and at the said request of the plaintiff said defendant acceded to the plaintiff's said proposition to be released from the said contract, and the same was then and there, by mutual consent and understanding of the parties thereto, abandoned; that said defendant has ever since that time held and still holds said note as canceled, and ready and willing to surrender the same to the plaintiff; that said note would have been given up to the plaintiff at the time when said contract was abandoned but for the fact that the same was filed away among said defendant's papers at his dwelling-house, and not
56 then convenient of access; that the said note was in fact not negotiable, and had then nearly expired by the statute of limitations.

The defendants further allege, that thereupon after the abandonment of said contract by said plaintiff on the first day of December, 1864, said defendant procured the said Rice to convey said premises to the said Borup as part security for a loan then and there made by said defendant of the said Borup, and the said Borup continued so to hold the same under said conveyance and as such collateral security until on or about the 19th day of February, A. D. 1866, when said defendant gave the said lands, as he lawfully might do, to his wife, the defendant, Rebecca E. Myrick, and at his request the said Borup, by deed of that date, duly conveyed the said lands to the said Rebecca E. Myrick.

That afterwards the said Rebecca E. Myrick, at her own
57 expense and in her own right, to further assure her title to the said premises as against the said Henry Roi and Joseph Longie, who had now become of full age, procured from the said Roi and Longie, respectively, the deeds referred to in folios 25, 26, and 27 of said complaint, and for which deeds she paid a valuable consideration to the said respective grantors.

And the defendants admit the conveyance to William Branch of one undivided three-fourths part of said premises, and allege the payment of the said consideration-money to the said Rebecca E. Myrick in her own right, being the same conveyance referred to in folio 30 of said complaint.

And the defendants admit the allegation contained in folios 31 and 32 of said complaint, and that the said Nathan Myrick still holds
58 the title to said lots and blocks in said town-site of Thompson.

III. And for a further defense the defendants allege that the plaintiff's alleged pretended cause of action hath not accrued within six years next preceding the time of the commencement of this action, and the same is barred by the statutes of limitation.

Wherefore this defendant demands judgment for his costs and disbursements.

GEO. L. OTIS,
Att'y for Defendants.

Duly verified.

59 (Case.)

This cause came on for trial at a general term of said court, and was tried by the court on the 22d day of August, 1871, the defendants first, by leave of court, amending their answer by striking out the words "if all" and "of the," and substituting the words "1862" for the words "1864" in folio 13 thereof; and the plaintiff, first moving for judgment on the pleadings on the ground that the plaintiff was not bound to pay the money until the defendant, Nathan Myrick, was ready to convey all the lands entered by the scrip, and because the answer rests on an abandonment, and there was no consideration for the abandonment; and which said motion the court then and there denied, and the plaintiff duly excepted.

The plaintiff thereupon offered in evidence original patents of the United States, as follows, viz:

Patent dated December 19th, 1859, to Henry Roi, reciting that
60 said Roi had surrendered certain Sioux half-breed certificate No. 481 C for 80 acres, in full satisfaction for lot numbered one, in section five, and lots numbered six and seven of section six, in town 48, range 16, in district of lands subject to sale at Buchanan, Minn., containing 82 and 17-100 acres (excess having been paid as per receipt No. 51).

Also patent, same date, to said Henry Roi, certificate No. 481 D, for 160 acres, surrendered in full satisfaction for lot numbered one, of section six, and lots numbered two, three and four, in section five, and lot numbered one, of section eight, in town. 48, range 16, in district of lands subject to sale at Buchanan, Minn., containing 171 23-100 acres (excess having been paid as per receiver's receipt No. 50).

Also patent of same date to Henry Roi, certificate No. 481 E, for 160 acres, surrendered in full satisfaction for lots numbered two and three, in section eight, and lots numbered one, two, and three, of section
61 nine, in town. 48, range 16, in district of lands subject to sale at Buchanan, Minn., containing 159 and 49-100 acres.

Also patent of same date to Joseph Longie, certificate No. 353 C, for 80 acres, surrendered in full satisfaction for lots numbered two and three, of section six, in town. 48, range 16, same district of lands, containing 80 and 5-100 acres (excess having been paid as per receiver's receipt No. 55).

Also patent of same date to Joseph Longie, certificate No. 353 D, for 160 acres, surrendered in full satisfaction for lot numbered five, in section five, and lots numbered four and five, in section six, and lots numbered five, six, and seven, in section eight, in town. 48, range 16, same district of lands, containing 173 and 23-100 acres (excess having been paid as per receiver's receipt No. 50).

Also patent of same date to Joseph Longie, certificate No. 253 E, for 160 acres, surrendered in full satisfaction for lot numbered four,
62 in section eight, and lots numbered six, seven, and eight, of section nine, in town. 48, range 16, same district of lands, containing 162 4 100 acres (excess having been paid as per receiver's receipt No. 53).

Also patent of same date to Joseph Longie, certificate No. 353 B, for 40 acres, surrendered in full satisfaction for lot numbered five, of section nine, of town. 48, range 16, same district of land, containing 57 and 31-100 acres (excess having been paid as per receiver's receipt No. 54).

Also patent dated July 10, 1861, to Henry Roi, certificate number 481 A and 481 B, for 80 acres, surrendered in full satisfaction for lots numbered five and six, of section ten, and lot numbered six, of section fifteen, town. 48, range 16, same district of lands, containing 74 and 53-100 acres.

All which patents purported to grant to the patentees therein named, respectively, and their heirs, the lands described in fee simple, and are duly signed and sealed. The said lands being the same
63 lands described in the pleadings in said action, and the said Henry Roi and Joseph Longie the same persons as those named in said complaint.

All said patents were received and read in evidence.

Plaintiff also offered and read in evidence a deed from Henry Roi to Rebecca E. Myrick, one of said defendants, dated Dec. 26th, 1866, acknowledged same day, whereby said Henry Roi, for the consideration of fifty dollars, granted and conveyed unto the said Rebecca E. Myrick, her heirs and assigns forever, lots one, six and seven, in section six; lots one, two, three and four, in section five; lots one, two, and three, in section eight; lots one, two and three, in section nine; lots four and six, in section ten; lot six, in section fifteen; all in township 48, range 16, which said deed was duly recorded in the proper office January 14th, 1857.

Also deed from N. Myrick and wife to H. M. Rice, dated July 2d, 1861, acknowledged July 3rd, 1861, recorded July 13th, 1861 (considera-
64 tion expressed, $2,000), and conveyed all the lands entered with the Roi and Longie scrip by plaintiff except those lots which were entered in July, 1861.

Also a deed from H. M. Rice and wife to T. Borup for same lands as last above, dated Dec. 1st, 1864, and recorded Dec. 10, 1864; consideration expressed, $4,000.

Also a deed from T. Borup and wife of the same lands to the defendant Rebecca E. Myrick, dated February 19th, 1866, acknowledged January 10th, 1867, and recorded January 17th, 1867; consideration expressed, $1,200.

Also a deed from N. Myrick and wife, the defendants, to the Western Land Association, its successors, &c., of all that part of lot one, section 8, town. 48, range 16, that lies north and east of the line of Vermillion street, in the town of Thompson, according to recorded plat thereof dated July 11th, 1870, recorded July 23d, 1870.

Also deed from Western Land Association to Nathan Myrick, his heirs and assigns, of lots 1, 5, 6, 13, 18, 19 and 20, block 1; lots 8,
65 17, 18, 22, 23, 27, and 28, block 2; lots 4, 5, 10, 11, and 12, block 3; lots 26, 27, 33, 34, 35, 42, 43, 44, and 45; in block 5; all in town of Thompson, Carlton County, Minn., dated July 15th, 1870; recorded July 23rd, 1870.

And thereupon the plaintiff, to maintain the issue on his part, was called as a witness in his own behalf, who, having been duly sworn, testified as follows, viz:

I have lived in Minnesota 21 years; am party named in contract read; have been over the principal portion of these lands several times; I first saw a portion of them in 1857; they commenced at the foot of the falls of St. Louis River, and extended on both sides of river from head of rapids to High Portage; they extend from 2 to 3 miles by the river; they comprise most of the water power there; it was intended to comprise all of it at time of location; the fall is great; these lands, I should think, have a fall of 200 feet, very large, and we always regarded them very important. I commenced occupying these lands in 1854; made a slight improvement only; I occupied them from 1855 to 1858.

66 (The defendant here objected to any testimony as to occupancy or improvement by plaintiff as immaterial. Objection overruled, and exception by defendant.)

I put on 4 locators in the spring and summer of 1855; in the winter of 1855–'6 I had 5 locators on; we expended $1,900.

(Above testimony received under the same objection, ruling, and exception.)

Kept them on till fall of 1858, until the agreement with Myrick; think I made arrangement for them to leave about 1st July, 1859. I was holding these lands at time of this agreement; from May, 1856, until the time of this contract I was under very heavy expenses, furnishing supplies.

Question. Had M'r Myrick and you any reference in this agreement to any particular land to locate this scrip upon?

(Objected to by defendant as incompetent and immaterial. Objection overruled, and exception by defendant.)

67 Answer. The contract was made upon my representation of character of lands, and my improvements, and the reason why I wanted the scrip. He knew that I had men on the lands. The scrip was intended to be entered upon the same land that it was entered upon. A small portion of the lands was not located until after the rest. We found a pre-emptor had settled on a portion of the lands, and found notice in the land office, and to avoid a contiact that was withdrawn. This last scrip was located about 2 years after the first. Delay was for

purpose of getting the pre-emptor to withdraw. I was negotiating with pre-emptor to withdraw, but didn't get him to withdraw. The rule of the office at that time was—and as far as possible I endeavored to cover as many pieces as I could with 160 acres—the rule was I could pay amount of excess. If there was any deficiency, I lost that. I paid for the excess at $1.25 per acre in cash, and I made an excess when the land would enable me to, as far as the office would
68 permit.

Question. What were your necessary expenses in locating the scrip?

(Question objected to by defendant's counsel as incompetent and immaterial. Objection overruled and exception taken.)

Answer. M'r Buckman's expenses, who did most of this business for me, were a little over $500; my own were probably $125. My impression is that it was some little time after location before patents were issued. M'r Myrick has never conveyed, nor offered to convey, these lands to me. I don't know where the note I gave is. I last saw it the day I gave it. M'r Myrick never made a demand for payment of the note upon me. He at the time spoke to me about getting some money on the lands, or some money of me in payment for the lands; perhaps once or twice within a short time of each other. The first time he spoke to me I told him I thought I could raise the money in 30 or 40
69 days. I should have to make a statement of facts and draw on my brother-in-law. That was the latter part of summer of 1864—during the summer or fall of 1864. M'r Rice held the title to the entries of 1859 then. That was all that was said then.

A short time after, and before the expiration of the time fixed, we had a talk. I then found, and in fact had known before, that he was not able to convey full title. I had a conversation with him in which he said he could not and would not convey the whole to me for the reason that there had been a good deal more delay, expense and trouble in fixing up the matter than he expected, and he wanted to retain one-fourth interest. He said he would convey me three-fourths of the land to which he claimed to have title (title in Rice) if I would pay the whole amount of the note and interest up to that time; and as soon after as he could he would perfect title in me to the second entry, which he
70 did not then pretend to have any title to. I told him that I could not possibly do it, it would be in violation of my arrangement with my brother-in-law, first, for the reason that it would require me to secure money from other parties than those I had expected, and besides I thought I was fully entitled to all the property under the agreement.

The next day, or very soon after, I told him I would raise the money and pay up my note upon his giving me security to perfect the title. I had found a person to furnish the money, and stood ready to pay him until I heard of his sale to Borup. He still claimed the one-fourth interest. That separated us more than anything else, his desire to have the one-fourth interest. The sale to Borup occurred very shortly afterwards, it may have been a week or two. I saw Myrick after this conveyance to Borup; I complained very much of his treatment. He said he was in such a situation he was compelled to give security to Borup;
71 that he would get it out and make it all right. I have had the ability at all times to fulfill my part of this agreement; I could have raised the money at any time, upon his perfecting the title, any time upon my own statement that the title was perfected in me, or upon my statement that the title was perfected in him and would be in me.

In speaking of title not being perfected, I mean I was not satisfied with such a title as Myrick had; it was by guardian's sale, and that only covered the first entries. I know Henry Roi and Joseph Longie, named in that agreement, and had long before the agreement. Henry Roi was between 14 and 16 years old, I think, at the time of the agreement, somewhere about that age; Longie was younger, probably 2 or 3 years younger. He is not alive now. I think had died 2 or 3 years ago. I valued this land at over $15,000 in 1861–'2.

Cross-examination:

72 I entered this land with scrip. Mr. Myrick furnished the scrip. I never paid for it. I entered it at the Duluth office, I think; I was in St. Paul, I think, when the scrip was entered. I didn't locate it personally; Joseph Y. Buckman entered it. I think he lived here then. He located it at the office; I think it was located in the winter. I saw the note when it was made. I think it was drawn at 12 months. The paper shown is the note. I think it was given at the same time the agreement was drawn, and to be held with it. I was here when it matured. I went to Hollinshead to inquire about it, and found it was not left with him as it was to be. I did not go to see Mr. Myrick. Have no recollection of going to see him then. That was in fall of 1859. I think Mr. Myrick and I had a conversation about this matter while Myrick was taking proceedings in the probate court. I don't recollect as we had conversation before that.

Question. What was the conversation between you and My-
73 rick at the time of the probate proceedings?

(Objected to as irrelevant and not cross-examination. Objection overruled, and exception by plaintiff's counsel.)

Answer. It was generally to see how proceedings of probate court could be made with least expense. It was done by M'r Buckman; I think; done by him because he had attended to the business before. Nothing said at that time, except what had reference to sale. I don't know that I said anything at that time to Myrick about the title to these lands. The next conversation of any importance was when he told me he wanted some money bad, and I must raise some money on this note. This was in the summer of 1864. I met M'r Myrick in New York, Washington, and Philadelphia. He never asked me to pay that note in New York. I have no recollection of his asking me for any money
74 to apply on that note. He may have said he was hard up and wanted some money. We have borrowed of each other. He never asked me to pay money on that note in New York. I think he had asked me in New York if I had any money. This was in 1864. I never forgot that note. I always regarded it as due when Myrick tendered me a title.

Question. State what steps M'r Myrick took prior to 1864 to perfect the title.

(Objected to by plaintiff's counsel as incompetent and immaterial. Objection sustained.)

I know Myrick's title came through guardian's sale by the records. I examined these records very soon after. I saw order of sale, return of sale, guardian's report of sale. I think I read that. That was some time in 1861 or 1862. I said to Myrick, title not perfect. The first serious conversation about this was when he wanted payment of
75 note. This was prior to 1864, and at that time also had casual conversation about whether patents returned, &c. Didn't inquire about the note. I did tell Myrick that I was not contented to

take his probate return as a title. The first time I told him that distinctly was when he asked the payment of the note. That occurred here in the city; can't recollect when, exactly. Had one conversation, and I think likely this one in Benson's office. I recollect going to his house once. I don't recollect that conversation, but think it was with a view to an arrangement of the matter after he demanded a fourth interest. I recollect I never had any conversation with him about business at his house in the presence of any one. I am not accustomed to talk about business before third persons; more a habit than anything else. I never considered myself insolvent. There were judgments against me; I don't know how many. There was one of Brown and Mc-
76 Laren for about $2,800. Won't swear it was not $3,900. Wipperman had a judgment for $1,000. It may have been $1,400; likely. About 26th of June, 1863, E. C. Palmer got a judgment against me for $1,000; that is paid, I think. That was about September 3d, 1866. C. E. Flandrau got a judgment about August, 1863, for about $600. Hav'n't paid that. The judgment of McLaren & Brown was paid by sale of property. Von Glahn got judgment. I suppose $2,945. J. Jay Knox & Co. got judgment for about $281.36. I didn't pay Von Glahn judgment, and only part of Knox judgment. I don't recollect about the judgment in favor of Bennett Link for $800, obtained October, 1859. I know J. K. Ward. That debt originated by my borrowing money. I paid the debt. I think M'r Becker paid the judgment. That was likely for $513. John H. Harrison got a judgment against me for $181. It is not paid. I owed Morris Lamprey, I think,
77 likely, a small sum. He may have got a judgment against me. I don't know how many judgments J. Jay Knox & Co. got against me; only recollect one debt. I had property judgment could have been levied on, out of Minnesota. Don't know that I had any perfected titles in Minnesota. Don't know that judgment could have been collected against me.

Redirect:

Mr. Buckman is dead; died in Sioux City, Iowa, in the summer of 1864 or 1865. I was under contract to pay for the land, not for any scrip. Mr. Hollinshead was to hold both note and agreement; that was the understanding; the papers were put in his hands; he drew the agreement and held it as long as he lived; he is the same one that witnessed it. Buckman acted for me in locating the scrip; he was paid by me. I paid him $300 a year and furnished him.

The plaintiff next offered the deposition of Henry M. Rice, which
78 was received in evidence and read as follows, viz:

I have lived in S't Paul about 22 years; known Myrick about 30 years, and Thompson about 20 years. I am the party named in the pleadings as the one in whom the title to certain lands therein specified was vested from 1861 to 1864. Defendant admitted at this time that he had an arrangement with plaintiff in reference to said lands. I had been over the lands referred to, which are situated at or near the Falls of the S't Louis River, in the present county of Carlton, Minnesota. The last time I examined the lands was in the year 1847; they are located from 18 to 25 miles by the river from its mouth. Had been up at the head of Lake Superior quite a number of times. I cannot fix the value of these lands in 1864. I never had in my possession the note for $2,800 referred to in pleadings. I had a conversation with the plaintiff in reference to his taking the title to these lands while I held them.
79 The last conversation was in the year 1863 or 1864. I told plaintiff that I held the title to these lands, and that I would be compelled

to deed the property to whomsoever Myrick should name, and whenever he should so desire, and advised him to take the title himself. He said that Myrick had not complied with his contract; that he, plaintiff, had an arrangement with some one in New York—I think his brother-in-law—in regard to the property. I told plaintiff that Myrick was very much in want of money, and that if I could aid him, plaintiff, in getting the money, I would gladly do so. Plaintiff replied as last aforesaid. I think plaintiff said that there were two fractions or pieces of these lands to which Myrick had not perfected the title. I was willing and able to aid plaintiff in adjusting the matter with Mr. Myrick, as a friend to both. I could have raised the money for plaintiff necessary to effect
80 this adjustment, and was willing to do so if we could have agreed upon terms. We did not come to terms; I made no offer and received none. Mr. Myrick told me he was owing Mr. Borup, and very much in want of money, and his necessity was such that he could not wait on Mr. Thompson any longer. I knew nothing about the actual state of the title myself of the lands in question.

Cross-examination:

Mr. Myrick told me that he tried for several years to make plaintiff take the property, and could not get a cent out of him. This was not in plaintiff's presence.

Redirect:

Myrick said nothing about any imperfection in the title. He told me this in substance two or three times and the last time about the time I made the deed to Borup. Can't remember the date at which he first told me so.

The plaintiff next offered the deposition of P. P. Wintermute, which was received in evidence, and read as follows, viz:

81 My name is P. P. Wintermute; my age 38 years; my residence is in New York; I know the parties to this action, and have known them ten or eleven years.

Third interrogatory. State whether or not in the summer or fall of the year 1864, you had any knowledge respecting a contract then existing between the plaintiff herein and the defendant, Nathan Myrick, respecting a large number of acres of land situated at or near the dalles of the St. Louis River, in the county of Carlton, and State of Minnesota, the legal title of which was then held or supposed to be held by the Hon. Henry M. Rice, of St. Paul, Minnesota. If yea, state, generally and briefly, the particulars and grounds of your knowledge on the subject.

Answer. About the year 1864, I think in the summer or fall, the plaintiff came to me and stated that he had a contract with Nathan Myrick, the defendant, whereby Myrick had agreed to convey or had conveyed to the plaintiff an interest in lands situated near
82 the dalles of the St. Louis River, in the county of Carlton, Minnesota, and said he would have to pay upon said contract between $3,000 or $4,000 in order to get the title, and asked me if I would advance the money and hold the land for security. I told the plaintiff I thought I would. I had several conversations with the plaintiff about this time to the same effect. Plaintiff exhibited to me a map and pointed out the lands, and I was satisfied that the security offered was sufficient, judging from plaintiff's representations.

(The defendants' counsel objected to the foregoing answer as irrelevant, incompetent, and declarations of plaintiff. Objection overruled and exception taken.)

Fifth interrogatory. State whether or not the said Benjamin Thompson,

during the summer or fall of the year 1864, at St. Paul, Minn., applied to you for a loan of money to enable him to pay the note referred
83 to in the contract mentioned in the last proceeding interrogatory. If yea, state whether or not you were ready and willing and able to furnish said money, and whether there was any understanding or arrangement entered into between you and said plaintiff, by which you were to furnish said plaintiff with said money.

Answer. The plaintiff never applied to me for a loan of money otherwise than stated in answer to the third interrogatory to my recollection, but before any arrangement was consummated between myself and plaintiff I understood defendant had sold the land to Borup, and then all negotiations ceased. That I was ready, willing, and able to furnish the money to plaintiff if everything had been as the plaintiff represented. I had no reason to think plaintiff's representations untrue.

(Defendant's counsel objects to the foregoing question and to the answer to the same as irrelevant and immaterial. Objection overruled and exception taken.)

Sixth interrogatory. If you answer the last interrogatory af-
84 firmatively, please state whether such arrangement was consummated, and if not, why not. Give particulars.

Answer. There was no final consummation of the arrangement. I had considered the matter sufficiently to satisfy me that the security was good if plaintiff's statement was true, and had concluded to advance the money and take the land as plaintiff proposed, but before perfecting the matter I understood that Myrick had sold the land to Borup, and I gave the thing no further attention.

(Same objection, ruling, and exception to above interrogatory and answer as to the fifth interrogatory and answer.)

To the cross-interrogatories witness answered as follows, viz:

I cannot give the dates of the conversation between myself and the plaintiff more definitely than I have already stated, except that it was shortly before the sale to Borup. The conversation with plaintiff took place while Galusha occupied the old Hollinshead office, and took place principally there. If any other person than myself and plaintiff
85 was present it was Galusha, as I recollect talking with Galusha about it at the time. I cannot state the conversation any more fully than I have already done. No security other than the land was offered by the plaintiff or required by me. The matter of security was never fully investigated. I founded my judgment principally upon plaintiff's representations. I know of no other security plaintiff had beside the land; none was talked about. I remember nothing whatever about a note; none was talked of between myself and plaintiff, and I have no recollection of seeing any. I swear positively that plaintiff told me he wanted to borrow money and, as I understood from him, to pay upon the contract for this land. As I have before said, I don't recollect hearing him say anything about the note or any note. I have no recollection of anything further.

The plaintiff thereupon rested his case.

And thereupon the defendants, to maintain their issue, put in
86 evidence the note in question, of which the following is a true copy:

$2,800.] ST PAUL, *September 6th*, 1858.

Twelve months after date I promise to pay to Nathan Myrick twenty-eight hundred dollars, without defalcation, for value received.

(Signed) BENJAMIN THOMPSON.

The defendants thereupon called as a witness Nathan Myrick, one of said defendants, who, having been first duly sworn, testified as follows, viz:

I resided in S't Paul in 1858. I have known Thompson ever since I have been in the State. Heard plaintiff's testimony. I recollect the agreement he referred to. Hollinshead drafted that. It is now in my possession. I have had it since 1864, I think; not positive; in possession of Hollinshead and Galusha. This is the paper the agreement set up in the complaint. Plaintiff came to me and wanted to buy Sioux
87 half-breed scrip in 1858. I told him I had some, and told him the kind, Minor scrip, same kind referred to in agreement. He told me he wanted 800 or 900 acres. The scrip I held was issued under the act of Congress mentioned in agreement. I set price to scrip as per agreement. It resulted in this agreement. The note was drawn at the same time. The agreement was left with Hollinshead and I took the note. The note was not left with Hollinshead, nor was such the agreement. Thompson told me he wanted to enter land on the S't Louis River. He did not show me the subdivision. I delivered the scrip to plaintiff, I think, at the time. Plaintiff located the scrip or had it located. I supposed it was all located until 1864 or 1865. I think then Thompson told me some of it had been omitted and hadn't gone through the probate court. I ascertained through plaintiff that the scrip was located, and I got the numbers so I could proceed in the probate
88 office. This was in the winter of 1858 or 1859. He didn't tell me then that part was not located. I didn't know part was omitted until I was discharged as guardian.

(Plaintiff's counsel here objects to testimony as to proceedings taken by defendant as immaterial, not best evidence, and no foundation laid. Testimony allowed, and plaintiff's counsel excepts.)

I took steps to be appointed guardian in Ramsey County in 1858 or January, 1859. I then took necessary steps to have the scrip which was located and the land sold. Plaintiff and I conversed frequently as to how proceedings should be taken. It was all understood between us that I should be appointed guardian, and that steps should be taken to advertise and sell the land, and that Magruder should bid off the land. We both had confidence in Magruder. Magruder bid off the land. The agreement between us was carried out as far as it went. I had a
89 conversation with plaintiff after it was done. Told him Magruder had bid it off and conveyed it to me so that I could give it to plaintiff when he paid the note. I kept plaintiff posted every step I took until I deeded to Borup. I told plaintiff I was ready to convey the land right after I got the deed from Magruder. I asked for money several times, and wanted it, too. When I first told plaintiff I was ready to convey, he didn't make any objection to the title. He never made any objection to the title to me. All the objection he made was that he was hard up and couldn't raise the money. I don't suppose 6 months elapsed for 3 years that I didn't ask for the money. I have no doubt I spoke to him 8 or 10 times about the money, until he finally gave it up, and said he could not pay it. He never made any objection to the title to the land.

In 1861 I was considerably embarrassed, and I conveyed it to Rice so that I could have it deeded to plaintiff if he paid the money free from judgment. I told plaintiff so after I had given the deed to Rice.
90 I think the deed to Rice was July 18th, 1861. After conveyance to Rice I saw plaintiff again. There was no abstract that I know of there to give him a title. He never made any objection that I know

of to title. The only objection he made was that he hadn't money. So until 1862, when he abandoned it. Prior to that I spoke to him about it in New York. He said he would see his brother-in-law if he could raise the money. He told me his brother in-law said he had advanced all he could to him. Either at that time or after he got home he abandoned the contract. He said he was unable to pay for it, and gave up all claim to the property. It so stood, and I made no disposition of the property until the fall of 1864.

Plaintiff came to my house and said he wanted to have a talk with me again about those lands. He said he wanted me to understand that he made no claim to the lands, but wanted me to make him a
91 proposition as to what I would take for the lands. I told him I had carried the lands so far, had paid the taxes, which were considerable, and up to that time there were was no prospect of the lands being of any value. About that time there was talk of the Lake Superior Railroad running to Superior or Duluth, and in either case very near these lands, and it would enhance their value. I told him I would convey to him four-fifths of the land if he would pay the note and interest up to that time, retaining one-fifth myself. Money to be paid within 15 days. He says it was a liberal offer, more so than he had expected, and he would accept it. This was at my house, corner of 4th and Walnut streets. I have a distinct recollection of this, for I wanted the money, and expected to get it of him, otherwise I had to make a loan. I waited till the expiration of the 15 days, and he didn't get the money. I saw the plaintiff at the end of 15 days. He said he couldn't
92 get the money then, but thought he could in a few days, and I extended the time 10 or 15 days longer. I think to the last of the month. Either to a particular date or particular number of days.

Before the last time expired he came into Benson's livery stable with a copy of that agreement, handed it to me across the stove, and wanted me to read it. I obtained the original agreement either in 1864 or 1865, and after plaintiff handed me this copy. When he wanted me to read the agreement I asked him what he wanted me to do with that, that I considered it null and void and thrown up some time ago. That was the first intimation I had that he backed down from the agreement. He said he didn't want me to have any interest in the property. He couldn't handle it as well if I had an interest in it. I told him if that was the view he took of it I hadn't anything more to say about it. Noth-
93 ing more was said about it until a long time after. He threatened to bring suit. He made no objection to the title. I made a loan of T. Borup, and deeded it to Borup, with the understanding that he was to deed it back if I paid the loan. I paid the loan and Borup conveyed it to my wife, at my request. I had got out of embarrassment pretty much then, and thought I would give it to her. The deed from Rice to Borup was dated the 1st, acknowledged the 2nd, and recorded the 10th of December, 1864. The deed from Borup to M'r's Myrick was dated the 19th day of July, 1866, acknowledged the 10th, and recorded the 17th of January, 1867. First acknowledgement on this deed is dated February 5th, 1866, and it was first recorded April 13th, 1866. A pencil-line is drawn through this acknowledgement. I think there was a mistake in the acknowledgement, and that it was reacknowledged and rerecorded. M'r's Myrick furnished the money to get the deeds
94 from the half-breeds, and think about $100 was paid for them, and that $2.50 would cover the expense of getting them. I didn't have the note with me when the contract was abandoned. I didn't

think it of any consequence. I never made any claim upon the note, and am ready to surrender it now.

(The defendants there made tender of the note.)

The consideration-money from Borup was paid by bank-check to my wife, and she deposited it in her own name. She took a certificate of deposit. The money belonged to my wife. The legal title to the one-fourth interest is in my wife, except a few lots conveyed to me. M'r Thompson was reputed insolvent from the time note matured until suit commenced.

I first knew in 1865 or 1866 that plaintiff had not located all the scrip. Thompson did not feel very well towards me for several months after this 1864 operation. After a while he came to me and told me
95 three fractions hadn't gone through the probate court; that there was a man who made a claim, and that he, Thompson, had let the scrip for these tracts lie unlocated. He wanted me to be reappointed guardian and sell these fractions and deed it to him, and that would heal up the break between us. I told him I would if he would pay all expenses. There was some doubt whether I could be reappointed, and whether the half-breeds had come of age then. He was willing to take the risk if I would be reappointed and make sale. I made application and was reappointed guardian. The property was advertised and sold according to this understanding. He expected his man to be there to bid it in. He authorized M'r Ritchie to bid $1.25 an acre. Another man bid $2.00 and claimed the land. I became convinced, however, that that the half-breeds were of age, and was not willing to deed
96 the land, and returned the money and tendered deed back. These lands were included, I think, in the Roi deeds. Plaintiff never made any claim against me for excess paid by him in entering lands. I have always paid the taxes myself on these lands. Plaintiff never paid any taxes on these lands that I know of. I held title to these lands and have seen a portion of them.

Question. What was the value of these lands prior to 1864?

(Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial. Objection overruled and exception taken by plaintiff.)

Answer. I don't know. I don't think they had any cash value before the location of railroad.

Question. What effect did the location of the Lake Superior Railroad have on these lands?

(Plaintiff's counsel objects, as incompetent and immaterial. Overruled, the defendant proposing to show when the location of
97 railroad was made.)

Answer. Its location had very great effect in enhancing their value. They advanced from about nothing until you couldn't buy them to-day, I think, for $200,000. The railroad crosses these lands; the town of Thompson is one of the stations on the road, and that lies on these lands.

Question. When was this railroad located?

(Same objection and ruling.)

Answer. It was located across these lands in the fall of 1867 or 1868. M'r Thompson informed me, after the Borup sale, that two or three pieces had been omitted in the probate court, and asked me if I would let him have them if he would pay expenses. After the sale I found half-breeds of age, and didn't dare to give deed, and refunded the money. Afterwards I went up country and found the half-breeds and got a deed and stood ready to deed these pieces to Thompson
98 upon his paying expenses. I heard plaintiff's testimony as to

amount of excess paid by him. He never said anything to me about that excess paid; never made any demand on me. He may have told me some time he had paid it. I have no recollection of it.

Cross-examination:

All the conversation previous to the agreement culminated in the agreement. I do not claim that there was any other agreement than what was expressed in that writing at that time. I don't remember how many pieces of scrip there were. I delivered, I think, 480 acres for each half-breed; might have been an eighty or forty out. I handed over the scrip to be located under that agreement. I don't remember whether certificates of location were made before patent issued. I think M'r Thompson gave me the description of the lands. I had a survey-
99 or's township plat of the property. It may be one plaintiff furnished or one I got at land-office at the time. I think I knew the actual number of acres I delivered. I think I gave a description of the property at time I made first application to the probate court. I don't remember the number of acres I stated. I presume I heard the number at the time. I can't remember the year I received patents. It was not long after location; not more than two years, I think. I don't think I delivered up my certificates to get the patents. I think I wrote for the patents and got them all together. Patents for the fractions received afterwards. I presume I saw that there had been an excess of land in some cases in the patents themselves over and above what the scrip called for. Don't think there could be an excess of money paid with out an excess of land.

(Witness shows patent to Joseph Lougie, 162 and 34-100 acres, entered with 160 acres of scrip; excess, 2 and 34-100 acres. Wit-
100 ness is shown another patent with excess of 13 acres.)

I presume I saw the patent, and knew there must be an excess. These lands were sold to Magruder on probate proceedings. I don't remember details whether I was at sale or not; don't think I was. The sale came off at Twin Lakes, I think; not positive. I don't suppose I know anything about the sale except what I have been told.

Question. Did Magruder pay you any money on that sale?

(Objected to by defendant's counsel as incompetent and immaterial. Objection overruled and exception taken.)

Answer. I think he did; don't remember the amount. It was paid at St. Paul or Travers des Sioux. I don't remember which.

Question. Did you pay anything to Magruder when he deeded to you?

(Same objection, ruling, and exception.)

101 Answer. There might have been some small nominal sum paid to make the deed valid. I won't swear positively whether I paid anything—actual money.

Question. Did you keep what Magruder paid you?

(Same objection, ruling, and exception.)

Answer. I presume I did, for the money belonged to me for the scrip. I disbursed it in maintaining some members of the Roi and Lougie families. I got Magruder's money and the land, too. I think it was in 1859 I first commenced proceedings to sell these lands in probate court. Don't recollect the time exactly. It might have been in November or December. I think I commenced in 1859, and completed them about the middle of the year 1860. I could not convey until these proceedings were consummated. I had a conversation with plaintiff immedi-
ately after I was prepared to give him a deed. I think I had the
102 first conversation with him in 1860; talked with him in 1861-'2.

I had made no attempt during this time to get deed from half-breeds. I was here in St. Paul when I first offered to convey. I told plaintiff I wanted payment of the whole of the note, and he take the land that had been through the probate court. All the title I had or claimed was through these probate proceedings. I made conveyance to Rice without plaintiff's knowledge at the time. I first told him of it, I think, in summer of 1861; not a great while after sale; not over 2 or 3 months, and might not have been that long; I never asked plaintiff to secure the note. When I made conveyance to Rice this agreement was in full force. This interview with plaintiff in New York was in the summer of 1862, I think. That is where I claim the contract was abandoned, or shortly thereafter, when we got back to St. Paul. I
103 don't think I was there in New York more than 3 or 4 weeks before returning to St. Paul. I think likely this conversation occurred at hotel in New York. Our talk only lasted a few minutes. Don't think I had the note there. I don't know plaintiff's brother in law; have heard of him by reputation; heard plaintiff speak of him; that is about all I know of him. I was there alone without my family. This interview at my house was in the fall of 1864, in October or November. I think the note was in the safe in Mackubin's block. I kept my papers there. I think it was there or in Benson's safe where I kept papers. Not certain which. This was the first interview after the abandonment. I think there was no figuring on the note when we were together.

Plaintiff did not object at the time to my retaining an interest. I was to retain an interest in the part that had gone through the probate court. That is the land we talked about. I had got no deeds from these
104 half-breeds at this time. I had made no attempt at that time to get any. I think it was within a month of this interview that I conveyed to Borup. The original agreement must have been in the hands of Galusha at time of conveyance to Borup. I must have got that from Galusha in 1867 or 1868. It was got about the time I took the second proceedings in probate court. Don't think I got it for the purpose of taking these proceedings. I got it after plaintiff had threatened to bring suit. In December, 1867, I think I first commenced proceedings to get deeds from these half-breeds. I think it was in the fall of 1866—yes, fall of 1866, I went up country myself, and did the business. I mean to say that my wife furnished her money for that; she got it from Branch for this property; Branch had paid some money on this, to secure the bargain, before this. My wife has other property in her name; but the money was raised out of this property.

105 I made this trade with Branch. He gave check to me in the first place. That was taken to the bank, most of it, and put in the bank in my wife's name. I think plaintiff first spoke to me about these three pieces of land located in 1866. I think there was about 72 acres there. It might have been in 1867 plaintiff spoke to me about the pieces. I think it was in 1867. Proceedings were taken in probate court not long after this. Plaintiff was to pay the expense of going through the probate court for these three pieces, and I agreed to it. I was not at the sale in person. Don't know what occurred at sale of my own personal knowledge. Return of sale was sent to me. I understood a man named Durfee was the highest bidder, and it was struck off to him. He paid me $2.00 an acre, cash. The money was remitted to me from Superior and sent on to New York by draft. I was there
106 when I received it. I returned it to him. He received it. I can't say for certain whether I made report of sale. I never offered to make conveyance of these lands to plaintiff based on the probate

proceedings. I did make a claim for the expense of these proceedings after they fell through. Don't think I ever demanded them of him. I got one deed from each of these half-breeds, and only one. The Roi deed embraced the whole land, the three pieces as well as the other. It embraced all that was located with the Roi scrip. I didn't understand that plaintiff's brother-in-law had some interest in these lands. Nothing was said about that when plaintiff said he would see his brother-in-law, only said he thought he could raise some money from him.

Redirect:

I got the agreement after plaintiff and I had agreed in reference to these three pieces of land. I applied to Mr. Galusha for it and he surrendered it. He held it, and I suppose got it from Hollinshead's
107 papers. I got the agreement after plaintiff threatened suit. The agreement to get title to three pieces was after the threatened suit, and I supposed that healed the breach. That was the mutual understanding, and I got the agreement from Galusha. I explained to Thomson why the sale fell through, that I was satisfied that the half-breeds were of age, and he was satisfied too. There was a talk then between us of getting a deed from the half-breeds of these three pieces of land. (Witness shown a paper.) I recognize that; it is a memorandum of expenses in the probate court. Not sure whether I showed it to plaintiff. It may not contain all. I made it out that I might show plaintiff the expenses.

(Defendant offers the paper in evidence. Objected to by plaintiff's counsel. Overruled and exception taken by plaintiff.)

I don't know that I ever presented that bill to plaintiff. He
108 spoke once or twice about expenses and said he would pay them.

(Testimony last above received under the same objection, ruling, and exceptions.)

Recross examination:

After probate proceedings fell through he talked of getting deed from half-breeds. The object was to get title so as to deed to him. He talked some of getting the deed himself. I went up to get a deed for other lands and included these. I told him of it. Expense he was to pay was expense of proceedings in probate court, and proper proportion of expense of getting deeds. The understanding was that he or I should get deed from the half-breeds. If I got it I was to deed to him upon payment of expenses of probate proceedings, and proper proportion of the expense of getting deed. No proportion was ever struck or made out. I think the Roi scrip was for 480 acres and the three pieces were 72 or 73 acres. No allowance was made for excess.

Redirect:

109 Plaintiff never paid nor offered to pay these expenses.

(To which evidence plaintiff objected as incompetent, immaterial, and irrelevant, but said court overruled said objection and plaintiff duly excepted thereto.)

The defendants thereupon called William Branch as a witness, who, having been duly sworn, testified as follows, viz:

I have lived in S't Paul about 19 years. I purchased a portion of these lands. I know the Myrick lands. My interest was an undivided three-fourths in certain pieces, and finally in the whole of them. I think I first saw these pieces in 1866. Am acquainted with value of lands in that vicinity. Have no knowledge of the value of the lands except at the time I first saw them. I am familiar with land in that vicinity.

Have dealt more or less in real estate in Minnesota and have an idea of value in that vicinity. I had no dealings there in 1864, or prior to that; my first purchase was in 1866. I had occasion to inquire into
110 value of lands there prior to 1864. I made inquiries at the time of engineers and surveyors as to price of lands; they were worth about $2.50 an acre.

(To which evidence plaintiff objected as incompetent, immaterial, and irrelevant, and witness not shown to be competent, but said court overruled the objection, to which plaintiff duly excepted.)

Question. What are the lands worth now?

(Objected to by plaintiff's counsel as incompetent, immaterial, irrelevant, and that no issues are tendered in pleadings on that subject. Defendant states that the object is to show the increased value from location of the railroad. Objection overruled and exception taken.)

Answer. Some portions are worth $1,000 per acre; will probably average $400 per acre.

Question. When did these lands first begin to increase in value over the $2.50 per acre?

111 (Same objection, ruling, and exceptions.)

It was first located over a portion of the lands in 1864. Survey was commenced in May, and completed in September. The location was changed, being first across, then through the lands. The original land-grant was passed May 5, 1864. Construction of that road commenced on that end this year. I think the arrangement under which the road was completed was made in the winter of 1868 and 1869. Arrangements was made to complete first 30 miles for 1868, and for completion of balance made in winter of 1868–'9; finally completed in summer of 1870.

Cross-examination:

I have been connected with the Superior Road before 1863, but took no active part until 1863. The first organization of company was in 1861. I think the survey was made prior to 1863; can't tell what year prior to my connection with the road; that was made by Clark.
112 Don't think that crossed these lands. These lands lie on both sides of Falls of S't Louis. Should judge they would probably have greater value than ordinary lands there on that account. There is a large and extensive water-power along there for 10 or 12 miles, and a very good water-power through these lands. I believe no slate quarries have been opened in them; there is slate rock. I have heard, since I made the purchase, that plaintiff claimed an interest in the lands. I think I made the first purchase in 1867; that was only a portion. I think that embraced an individual three-fourths to two-thirds of the land, and afterwards I bought an undivided three-fourths in the rest. I think this was in 1868 or 1869. The first purchase included the town-site of Thompson, on that portion of it belonging to Myrick. I did the business with N. Myrick. The amount of last purchase was $5,000, I think. In the earlier steps of this railroad enterprise there was
113 a good deal of discouragement as to whether it would go through.

Redirect:

The water-power extended about 9 to 10 miles, and good most of the way. Probably the best water-power is about 6 miles above our crossing, that is about six miles above these lands.

The defendant thereupon offers in evidence two guardian-deeds from Myrick to Magruder, one embracing the Roi, the other the Lougie tract. The former reads as follows, viz:

This indenture, made the fourteenth day of January, one thousand eight hundred and sixty, between Nathan Myrick, guardian of Henry Roi, minor, of the first part, and George Magruder, gentleman, of the second part, witnesseth:

Whereas John Penman, esquire, judge of probate of Ramsey County, heretofore, to wit, on the tenth day of December, 1859, made an order whereby the said party of the first part was licensed to sell the real estate belonging to his said ward, for reasons set forth in said
114 guardian's petition for said license; and whereas the whole of the premises described in the said order have accordingly been sold at public vendue, by the said party of the first part, on the 5th day of January, 1860, at the Twin-Lake post-office, in the county of Carlton, State of Minnesota, that being the county where the said premises are situated, due notice of the time and place of holding such sale having been given according to law.

And whereas the said party of the first part did, on the 14th day of January, 1869, make return of his proceedings upon such order of sale to the judge of said probate court in pursuance of said order, and of the statute in such case made and provided. And whereas afterwards the judge of probate of said Ramsey County, after examining the said proceedings did, on the 14th day of January, 1860, make an order confirming the said sale made as aforesaid.

115 And whereas the said party of the first part did, at said sale, sell to the said party of the second part, he being the highest bidder for the same, all the real estate belonging to said minor hereinafter described for the sum of one dollar and forty-five cents per acre, and for the aggregate sum of six hundred dollars, that being the highest sum bid for said premises at the said sale.

Now this indenture further witnesseth: That the said party of the first part in pursuance of the said sale, and of the said order of the said judge of probate, and in pursuance of the statute in such case made and provided, and also for and in consideration of the sum of six hundred dollars lawful money of the United States of America to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, and conveyed, and
116 doth by these presents bargain, sell, and convey unto the said party of the second part, his heirs and assigns for ever, all those certain pieces and parcels of land situated lying and being in the county of Carlton, State of Minnesota, and described as follows, to wit: Lot one (1), section six (6); lots two, three, and four (2, 3, and 4), section five (5); lot one (1), section (8); lot one (1), section (5); lots six and seven (6 and 7), section six (6); lots two and three (2 and 3), section eight (8); and lots one two and three (1, 2, and 3), section nine (9); township forty-eight (48), range sixteen (16) west, containing 412 and 39-100 acres, more or less, together with all the privileges and appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, and interest which the said Henry Roi, minor as aforesaid, at the time of the said sale had of, in, and to the same.

117 To have and to hold the above-described and conveyed premises, with the appurtenances and all the estate, right, and interest which the said minor at the time of said sale had therein unto the said party of the second part, his heirs and assigns forever, as fully and amply as the said party of the first part might, could, or ought to sell and convey the same by virtue of the orders aforesaid, and of the statute of this State in such case made and provided, or otherwise.

In witness whereof the said party of the first part doth hereunto set his hand and seal the day and year first above written.

N. MYRICK, [SEAL.]
Guardian.

Signed, sealed, and delivered in presence of—
JOHN PENMAN.
E. ST. JULIEN COX.

118 STATE OF MINNESOTA,
County of Nicollet, ss:

Be it remembered that on the 25th day of January, 1860, personally came before me Nathan Myrick, to me well known to be the identical person who signed and sealed the foregoing deed of conveyance, and he acknowledged that he executed the same free for the uses and purposes therein expressed.

[NOTARIAL SEAL.] E. ST JULIEN COX,
Notary Public, Minn.

(Endorsed:)

OFFICE OF REGISTER OF DEEDS,
St Louis County, Minn.

I hereby certify that the within deed was filed for record on the 21st day of May, A. D. 1860, at 6.30 p. m., and was duly recorded in liber B of deeds, pages 549 and 550.

JNO. DUMPHY,
Register of Deeds.

(Plaintiff's counsel objects to the introduction of the foregoing
119 deed in evidence on the ground that the preliminary proceedings in probate court necessary to authenticate the deed are not produced, and that it is incompetent and immaterial. Objection overruled and exception taken.

The second deed, embracing the Lougie tract, is a guardian's deed of the same tenor and effect as the preceeding deed.

(Same objection by plaintiff's counsel, and the further objection that there is no date to the acknowledgement. Same ruling and exceptions taken.)

Defendant offers in evidence a deed from George Magruder to N. Myrick. This is a deed of warranty in usual form, dated January 16th, 1860, acknowledged January 25th, 1860, recorded May 21st, 1860, from George Magruder to Nathan Myrick, expressing a consideration of $1,200, conveying all the land so entered by the Roi and Lougie scrip.

(Same objection, ruling, and exception.)

120 Defendant offers in evidence a deed from Myrick and wife to H. M. Rice. This is a deed of warranty, in usual form, dated July 2d, 1861, acknowledged July 3rd, 1861, recorded July 13th, 1861, from Nathan Myrick and Rebecca E., his wife, to H. M. Rice, expressing a consideration of $2,000, and conveying all the lands so entered with both the Roi and Lougie scrip.

(Same objection, ruling, and exception.)

Defendant offers in evidence a deed from Rice and wife to T. Borup. This is a deed of quit claim, in usual form, for same lands as above, consideration $4,000, dated December 1st, 1864, and recorded December 10th, 1864.

(Same objection, ruling, and exception.)

Defendant offers in evidence a deed from Borup and wife to R. E. Myrick.

This is a deed of bargain and sale, with special covenants of warranty, in usual form, dated February 19th, 1866, acknowledged January 10th, 1867, and recorded January 17th, 1867, for the same premises, made by T. Borup and wife to Rebecca E. Myrick, expressing a considera-
121 tion of $1,200.

Defendant offers in evidence deed from Henry Roi to R. E. Myrick. This is a warranty deed in usual form with full covenants, dated December 26th, 1866, acknowledged same day, and recorded January 14th, 1867, for tracts that were located with the Roi scrip, entered February 8th, 1859, consideration $50.

(Same objection, ruling and exception.)

Defendant offers in evidence deed from Joseph Longie to R. E. Myrick. This is a warranty deed in usual form with full covenants, dated January 3rd, 1867, acknowledged January 12th, 1867, and recorded January 17th, 1867, for all the tracts located with the Longie scrip, consideration $500.

(Same objection, ruling and exception.)

Above instruments all received in evidence.

Defendant thereupon recalls Nathan Myrick who testified as follows, viz:

122 I have been thinking over matters since I was last examined, and upon looking over some memoranda, I think the conversation with Thompson in New York, referred to, when the contract was abandoned, was in 1863. That is my best impression. Plaintiff and myself were there most every year for several years. I was there in 1862, and also in 1863, 1864, 1865, and up to 1866 or 1867.

Cross-examination:

It was at my suggestion that the amendment was made to the answer. I am very sure it was in 1862 or 1863 that this New York interview occurred. I am sure the abandonment was in 1862 or 1863. I think it was in 1863; I met him there several years commencing with 1859 or 1860 and up to 1865 or 1866. I know it was within 2 years of the matters that occurred in 1864. Nothing very particular made me change my mind, only I thought it over and concluded it was in 1863.

The defendants thereupon rest their case, and plaintiff for rebut-
123 ting testimony calls Mr's Benjamin Thompson, who having been first duly sworn, testified as follows:

I am wife of plaintiff; have been his wife 13 years. I know where my husband was during the years 1861, 1862, 1863 and 1864. In June, 1861, he went to Bayfield and stayed till toward the last of September. I was with him in Bayfield; from there we went to Massilon, Ohio. I stayed with him there till the last of October or 1st of November. I left him there and went to Baltimore, and met plaintiff again at Philadelphia, Christmas, 1861. Then we went to Massilon and stayed there till June, then to Chicago until August 1st, then we came here; from here we went up to Fort Abercrombie and stayed there till about the last of October, 1862. Then we went to visit hospitals. Then returned to St Paul, and remained there until March. In March, 1864, he went to Washington; was gone some weeks, when I followed him. Up to
124 March, 1864, he was not in the city of New York. I was in correspondence with him while gone, most every day, possibly every other day.

Cross-examination:

We went to Bayfield. Plaintiff was with me all the time there. From there we went to Massilon, Ohio. We reached there the 1st of October,

1861. I remained there till just before Christmas of 1861. He was with me all that time. Then I went to Baltimore about the 10th of December. I left him there at Massilon. I remained in Baltimore until about the 23rd of December, 1861. Plaintiff was not with me then. He joined me in Philadelphia. I went to Philadelphia from Baltimore about the 22d or 23d of December, 1861. I got there the same day I left Baltimore, about the 22d or 23d of December, 1861. I got there the same day I left Baltimore. He met me at the depot in Philadelphia. We went immediately to Buck County, Pennsylvania, to see his mother. He
125 went with me. Stopped at his mother's house and spent Christmas there. Stayed there till about the last of February, 1862. Plaintiff was there all the time. We then went back to Massilon. Plaintiff was with me. Got there about the last of February or 1st of March. Stayed there till last of June, 1862. Plaintiff was with me all the time, except a day or two when off in the neighborhood. Then we went to Chicago. We got there the last of June or first of July. He was with me. We stayed there until about the middle of July. Plaintiff was with me all the time. We stayed at Hyde Park, about 9 miles off. From there we came to S't Paul, he with me, and got here about the last of July, 1862. We remained here some months. Plaintiff remained until August. We left before the Indian outbreak, about the last of August or first of September. I saw plaintiff again in October, 1862, in S't Paul. I remained in S't Paul from the time he came from Chicago until about the first of November. Plaintiff and I left about that
126 time. We went to Chicago together. Went to Hyde Park. We remained there some weeks—two, three, four or five weeks. I remained there. Thompson went to Cairo about two days after we got there. He came back three days after.

We came back to S't Paul together. We remained in S't Paul until following February, 1867. Plaintiff was with me. Am positive he didn't leave S't Paul in that time. I then remained here, and about March, 1863, he went East. I remained here. He was there only two or three weeks, when I followed him and met him in Washington at Willard's Hotel. Don't remember whether M'r Rice was there in Washington then. Stayed in Washington until quite late in summer. Plaintiff was there all the time. I think we remained there until last of July. We then started for S't Paul. I don't remember what route we came. Don't remember whether we came back by New York route. My impression is we came by the Pittsburg and Fort Wayne route. I
127 was in New York last year. Was there thirteen years ago, and once since for a few hours. I can't say whether that was this time. We arrived here, I think, in August, 1863. Plaintiff was with me. I think we stayed here all that winter. I think we went last again in 1865. I think plaintiff, after we came here in August, 1863, if not here, was in Indian country. I am most positive he spent that summer on the Indian reservation until late in the fall. Am quite sure he went on the Sioux reservation again in the spring of 1864. It occupied him a long while.

Redirect:

The American House burned 23d of December, 1863. I had been boarding at the American House before it burned. We had been there off and on the year before. When it burned we went to M'r Brisbin's house on Fort street. We stayed there until the following March. Then I went East and met M'r Thompson in Washington. It was the

128 only time I was in Washington after 1861 with Mr. Thompson until 1864.

Examined by the court:

We were here in S't Paul from July, 1863, to March. We remained here after our return from Chicago, July, 1863, until the next March, and then went East.

Redirect:

Plaintiff went with Governor Ramsey to make a treaty with the Red Lake Indians the fall before the American House burned.

Recross-examination:

It was the Christmas of 1861 I passed at plaintiff's mother's. Went back to Massilon, Ohio, from March, 1862, until following June. Plaintiff was with me all that time. Then we went to Chicago. We remained there until middle of July. Then I went to Fort Abercombie; then returned to S't Paul; then went to visit hospitals. We remained here until March, 1863. We went to Washington, and I met him there
129 the following March. I have not been refreshing my recollection. I can only remember dates by events that took place.

Redirect:

In fall of 1862 plaintiff went to visit hospitals. Came back the same fall and went to American House. We were in S't Paul at American House the following year. We were burned out and went to Brisbin's. He then went East the March following the burning of American House.

Benjamin Thompson is thereupon recalled by plaintiff, and testified as follows, viz:

The last of June, 1861, I went over to Bayfield. Remained there until in September, and went from there to Massilon, Ohio. I went from there to see my mother near Philadelphia. I got there the day before Christmas, 1861. Was there Christmas day. I remained there until latter part of February, 1862, then came back to Massilon, and remained there and about there until last of June, 1862. I went
130 to Chicago and remained there until about the first of August, 1862. I started out to go up the Red River to aid in making a treaty with the Indians. I was driven into Abercrombie at time of the outbreak, and got back here in October, about the last boat going out that fall. I went down to Chicago to visit hospitals, under appointment. I got back to S't Paul in December, 1862. I remained here all that winter, all of next spring, until early in August. In August I went up with Gov. Ramsey to make this treaty—to the crossing of the Red Lake River. I came back and remained here until about 15th or 16th of March, 1864. Then went to Washington with Rice and Becker. I sent for wife to come down in the early part of April. She came down in April, and we remained East until some time in the fore part of July. We were in Washington, Philadelphia, Buck County, P'a, at my
131 mother's, and in New York. Got home in July. From the time in '61 until this time in '64, I hadn't been in New York. I had not been in New York from March, 1861, until July, 1864. I have no recollection of seeing or talking of Myrick on this matter from June, 1861, until I got back from the East, in 1864. I heard Myrick's testimony about an interview in New York. I had no interview with him in New York from '61 to '64. I was not in New York. I saw him there in '64 and '68, I think. Not very positive. I had no interview with him in New York in which I referred to my brother-in-law.

The plaintiff's counsel here offers to show that plaintiff had an arrangement with his brother-in-law, and had had, from the time the scrip was located and prior thereto, by which his brother-in-law was to furnish the money, under the contract stated in the complaint, when the title to
the land was vested in the plaintiff, for the purpose of supporting
132 testimony of the plaintiff as to this question of abandonment.

(Objected to by defendant's counsel as irrelevant, immaterial, and not proper at this time. Objection sustained and exception taken.)

I heard testimony of Myrick as to abandonment. I never gave up the contract. I never knew anything about any question of abandonment. I never made any statement to M'r Myrick that I would give up the contract. I had a copy of the agreement all the time. I heard what Myrick said about an interview at his house. I never thought of purchasing property in any way only by paying for it under the contract. I didn't ask him what he would sell the land for. I said yesterday, in this connection, that when I went to Myrick one of the difficulties I thought was that
he wanted to retain a fourth interest. I was mistaken; it was a
133 fifth. I never offered to let him have a fifth. I recollect nothing
about this fifteen days, unless he had confused it with my statement of yesterday; nothing about going back to get additional time. The first mentioned of these three pieces of land was made between Myrick and me immediately after this first location. M'r Myrick knew the first report that M'r Buckman made of difficulties. The first location was made in 1859. The location of these three pieces was made in 1861. Myrick knew these three pieces were not located after the first location in 1859. He knew they were located a few days after they were located in 1861, by return of certificates. I didn't know of the conveyance to Rice until some considerable time afterwards. I heard his testimony about the arrangement as to these three pieces. My recollection is that
some time after Myrick had conveyed to Borup he asked me what
134 was to be done with these three pieces. He had always said he
would do what was right. He said, at this time, he would perfect the title to that in me and make the other under the agreement right. He never claimed to me that the agreement had been abandoned I spoke of the excess and of the injustice of the arrangement he proposed.

Cross-examination:

I have been in New York City. I went back first and was in New York in 1855; was there in 1856, in 1858, in 1859. I was there in March, 1861, only one night. I was there again in 1864 and in 1865. From 1861 to 1864 I had no business there. Am sure I was there in 1864; I think about July. My wife was with me, I think. I was not in Washington in 1863. I borrowed $50 of Myrick. I think it was in 1864 or 1865, along in June or July; borrowed for current expenses. I didn't
borrow it in 1863 to go to New York. M'r Myrick said to me he
135 would convey those three pieces to me, I think, in 1865. The first
conversation after the conveyance to Borup, and after I threatened suit, was six or eight months after, and he asked me what he should do
with the three pieces. I said unless he conveyed to me I didn't
136 know what else he could do with it; I was ready to take it. We
talked over how title could be perfected. I said, as the title to the other had been through the probate court, I thought best to have this go through. I said I would take that land as so much upon our agreement. I said any additional expense he was put to in getting title I would pay it, and any additional expense he might have as to the other. This conversation took place here; think at the office Benson and Myrick

had together. I saw him again after he had probated, I think. I went to Judge Crowell with him. I agreed with him that Ritchie should attend and bid in land at sale. He was authorized to bid a certain amount, and Durfee bid more.

Redirect:

Question. What was said by M'r Myrick at the time referred to by M'r Otis in his cross examination, if anything, as to perfecting
137 the title to these lands by obtaining title from the half-breeds?

(Objected to by defendant's counsel as immaterial and not cross-examination. Objection overruled and exception taken.)

On return of the half-breed I told Myrick he had better get deed from him and perfect title to the whole lands. He said he would do so, and did do so. When I spoke of expenses I referred to expenses of perfecting title to these three pieces in me and expenses of perfecting title to other lands if it came to me. I agreed to pay probate expenses and all other expenses of perfecting title in me. One of these half-breeds lived at Fort Abercrombie at time deeds were obtained. The first preliminary survey of Superior Railroad was made by M'r Clarke in 1862; am not certain, but think it was in '62. It may have been in '61. I never gave Myrick permission to take that contract.

138 N. Myrick was thereupon recalled by defendant's counsel, and testified as follows, viz:

Plaintiff and I had a conversation as to the way of getting title to these three pieces of lands by deeds from half-breeds. He and I never passed a word in reference to getting a deed from the half-breeds for any other but these three pieces.

Cross-examined:

There was a coolness between us.

And no other evidence was offered by either party.

The cause was thereupon argued, and afterwards the court filed its decision in writing, in the words and figures following, viz:

Decision of court.

The decision of court is attached to and forms part of the judgment roll in this action, and for that reason is not made a part of the case.

The above case having been examined by me and found con-
139 formable to the truth, is hereby approved.

Dated March 6th, 1873.

W. WILKIN, *Judge.*

140 *Decision.*

This action came on to be tried by the court, a jury trial having been duly waived by the parties.

And now, having heard the proof of the said parties and the arguments of their respective counsel, I find as conclusions of fact herein, that on or about the 6th day of September, 1858, and prior to that time, the said Nathan Myrick was the attorney in fact, duly constituted, of one Francis Longie and Joseph Longie, son of said Francis, and was duly authorized, among other things, to locate certain half-breed scrip, more particularly described in the agreement recited in the complaint; and was also, at and during the same period, the attorney in fact, duly constituted, of one Francis Roi and Henry Roi, son of said Francis Roi, and was duly authorized, among other things, to locate certain

141 other half breed scrip, more particularly described in said agreement recited in the complaint, and was desirous of discovering valuable lands, situate in the State of Minnesota, whereon to locate the said half-breed scrip, and all of the same, or in default thereof, of disposing of said half-breed scrip in such manner as to secure the interests of the said owners, in pursuance of the said authority, and in discharge of the duty imposed upon him, the said Nathan Myrick, as attorney of the said parties; that at and prior to said 6th September, 1858, the said plaintiff had knowledge, and was by himself and his agents, servants and employees in actual possession of the lands hereinafter described, and had made valuable improvements thereon, and been at great expense thereabout to secure the title thereto in himself. That on
142 or about the 6th day of September, 1858, the said plaintiff and the said defendant, Nathan Myrick, for the purpose of securing the interests of all said parties, entered into and duly executed that certain agreement a true copy whereof is set forth in the complaint in this action. That the said agreement was duly delivered, and the half-breed scrip therein mentioned was delivered to said plaintiff by said Nathan Myrick, and the said plaintiff then and there delivered to said Nathan Myrick his, said plaintiff's, promissory note, as mentioned in said agreement, which said note is in the words and figures following, viz:

$2,800.] ST. PAUL, *September 6th*, 1858.

Twelve months after date I promise to pay to Nathan Myrick twenty-eight hundred dollars, without defalcation, for value received.

BENJAMIN THOMPSON.

143 That thereupon the said plaintiff proceeded to, and did locate a portion of said scrip upon the lands so known to and occupied by him as aforesaid, which said lands are described as follows, viz: lots one, two, three, and four, in section five; lots one, six, and seven, in section six; lots one, two, and three, in section eight; lots one, two, and three, in section nine; and were located and entered on the 8th day of February, A. D. 1859, by said plaintiff, in the name of the said Henry Roi; that afterwards, on the 17th day of January, 1861, the said plaintiff located a portion of said scrip on certain other of the lands so occupied by said plaintiff, in the name of said Henry Roi, upon lots five and six, in section ten, and lot six in section fifteen, all in township forty-eight, range sixteen; all which said locations and entries by said
144 plaintiff with said scrip, in the name of said Henry Roi, covered, comprised, and included four hundred and eighty-seven and 42-100 acres, the same being thirteen and 40-100 acres more than the said scrip called for, or than could be secured and paid for by the said 480 acres of scrip received from the said Myrick, and belonging to the said Henry Roi; and that such excess of land was at said time of entry paid for by the said plaintiff in cash, at the rate of one dollar and 25-100 per acre.

That on or about said 8th day of February, 1859, the said plaintiff located certain of the said scrip received of said Myrick as aforesaid, and belonging in the name of said Joseph Longie, upon certain other of the lands known to and occupied by said plaintiff as aforesaid, and did enter the same at the proper office; which said lands are described
145 as follows, viz: lot five, in section five; lots two, three, four, and five, in section six; lots four, five, six, and seven, in section eight; lots five, six, seven, and eight, in section nine; all in township forty-eight, of range sixteen west, in said State of Minnesota, and which loca-

tions and entries so made by said plaintiff, in the name of the said Joseph Longie, covered, comprised, and included four hundred and seventy-two and 82-100 acres of land, the same being 32 and 82-100 acres more than the said scrip called for, or than could be secured and paid for by the said 440 acres of scrip received of the said Myrick as aforesaid, belonging to the said Joseph Longie, and such excess of land was at the time of entry paid for by the said plaintiff in cash, at the rate of one dollar and 25-100 per acre.

146 That none of the said lots of land so entered by said plaintiff as aforesaid, contained the usual number of acres required by the mode of survey adopted by the Government of the United States, but were known as lots, or fractional pieces, and could not be entered with and by said half-breed scrip, except upon condition that plaintiff should pay for the excess over what the said scrip would cover in cash at the regular government rate per acre as stated above, and in order to secure the title to said lands, and obtain a number of acres equal to the number of acres called for by said scrip, said plaintiff was obliged to, and did enter said fractional lots, and pay for such excess in cash: that in consequence thereof the said Henry Roi obtained the title of and

147 to thirteen and 40-100 acres of said land, over and above the number of acres he was entitled to by reason of said scrip, and the said Joseph Longie obtained the title of and to thirty-two and 82-100 acres of land more than he was so entitled to, and in each case at the expense and with the money of said plaintiff.

That said plaintiff paid all the fees and expenses necessary to be paid in making said entries, and in locating said scrip, all of which amounted to the sum of five hundred dollars, exclusive of the amount so paid for such excess of land: that by reason of the said acts of the said plaintiff, and the payments made and expenses incurred by him, said plaintiff, the said Henry Roi acquired the title in fee of and to all and singular the said lands so entered in his name as aforesaid: and the said

148 Joseph Longie acquired the title in fee of and to all and singular the lands so entered in his name as aforesaid, by grant from the Government of the United States: that at the time of making said agreement, the said Nathan Myrick knew that said Thompson occupied the land above described, and intended to locate said scrip thereon; that after said half-breed scrip had been located upon, and the said Henry Roi and Joseph Longie had acquired the title to the lands above described (excepting these entered as aforesaid on the 17th day of January, A. D. 1861), the said Nathan Myrick, acting as guardian of the said Joseph Longie, by his deed bearing date the 19th day of January, 1860, conveyed to one George Magruder, all the said lands above described, belonging to and entered in the name of the said Longie, and all

149 the right, title, and interest, claim and demand, of the said Joseph Longie, his heirs, personal representatives, and assigns, in and to all and singular the said lands.

That said deed purported to be made upon a sale of said lands to said Magrauder, under and by virtue of a license issued by the probate court of the county of Ramsey, and State of Minnesota, upon petition therefor by the said Nathan Myrick, guardian as aforesaid, and contained the usual recitals and covenants, and was, on the 21st day of May, 1860, at 6.30 p. m., filed and recorded in the office of the register of deeds, of the county of Carlton, where said lands are situated, and recorded in book B, of deeds, on pages 548 and 549; that the said Nathan Myrick, acting as guardian of the said Henry Roi, by his deed bearing date the said 14th day of January, 1860, conveyed to the

said Magruder all and singular the said lands above described belonging to and entered in the name of the said Henry Roi, by said plaintiff, on the 8th day of February, 1859, and all the right, title, interest, claim, and demand of the said Henry Roi, his heirs and personal representatives, in and to all and singular the said lands; that said deed purported to be made upon a sale of the said lands to the said Magruder, under and by virtue of a license issued by the probate court of the county of Ramsey and State of Minnesota, upon petition therefor by the said Nathan Myrick, guardian as aforesaid, and contained the usual recitals and covenants, and was, on the said 21st day of May, 1860, at 6.30 p. m., duly recorded in the office of the register of deeds of said county of Carlton, where said lands are situated, in book B, of deeds, on pages 549 and 550.

That no proof was given upon the trial of this action that said sales of said land, or either of them, were made in conformity to law, or that any of the preliminary proceedings required by law to authorize such sales, were had, and I therefore find that the said sales were made without the requirements of law being complied with.

That on or about the 16th day of January, 1860, the said George Magruder, by his deed of that date, duly executed, conveyed to the said Nathan Myrick, his heirs and assigns in fee, all and singular the said lands previously conveyed to the said Magruder by said Myrick, guardian as aforesaid, which said deed was on the 21st day of May, 1860, at 6.30 p. m., duly recorded in the office of the register of deeds mentioned aforesaid; that no consideration but a mere nominal one was paid by said Myrick for said deed; that said deeds from said Myrick, guardian as aforesaid, to said Magruder, and said deed from said Magruder to said Myrick, was not, nor was either of them, made or procured to be made by the said Myrick, nor were any of the proceedings in reference to said sales taken or procured to be taken by said Myrick with intent to cheat or defraud the said plaintiff, but for the purpose and with the object of getting the title to said lands in him, the said Nathan Myrick, so as to enable him to carry out the agreement entered into between him and the said plaintiff as aforesaid; that said plaintiff knew that said Myrick was taking proceedings in said probate court to obtain authority to sell said lands for the purpose aforesaid, and consented thereto.

That on the 2d day of July, A. D. 1861, the said Nathan Myrick and said Rebecca E. Myrick, who then was and still is the wife of the said Nathan Myrick, conveyed by deed, in due form, all and singular the said land hereinbefore described as conveyed by said Magruder to said Nathan Myrick, to Henry M. Rice, his heirs and assigns, which said deed was duly recorded in the office of the register of deeds of the proper county, on the 13th day of July, 1861; that said deed to said Rice was not executed with intent to defraud said plaintiff; that said Nathan Myrick at the time of the execution of said last-mentioned deed, and for some time previous thereto, was in embarrassed circumstances and threatened with suits, and executed said deed to said Rice for the purpose of keeping the said lands clear from judgments against himself and where they could be conveyed to the plaintiff upon payment of said note, and without any consideration money from said Rice therefor, and upon an understanding and agreement between him and the said Rice that the said lands should be held subject to the order of him, the said Myrick, and the said Rice continued to hold the same subject to the order of said Myrick until the conveyance thereof by him hereinafter stated.

That on the first day of December, 1864, the said Henry M. Rice, and Matilda, his wife, by the direction of the said Nathan Myrick, by their deed in due form, conveyed all and singular the said lands (so conveyed by said Myrick and wife as aforesaid to said Rice) to Theodore Borup, his heirs and assigns; that said last mentioned conveyance was made to secure a loan made by said Borup to said Nathan Myrick, and upon the understanding and agreement between said Borup and said Nathan Myrick that said Borup should reconvey the said lands to said My-
155 rick upon payment of said loan, and that said last mentioned deed was recorded in the proper county, on the 10th day of December, A. D. 1864.

That afterwards, and on or about the 19th day of February, 1866, the said Theodore Borup, and Elizabeth, his wife, the said loan having been paid, and the said lands having been given by said Myrick to his said wife, by direction of said Nathan Myrick, conveyed the same lands to the defendant, Rebecca E. Myrick, her heirs and assigns, and that no consideration was paid by said Rebecca for said deed, which said deed was recorded in the proper county on the 13th day of April, 1866; that said last mentioned deed not having been acknowledged in due form to entitle the same to record, was afterwards, on the 10th day of January, 1867, reacknowledged in due form by said Borup and
156 wife, and again recorded in the proper county, on the 17th day of January, 1867.

That on the 26th day of December, 1866, the said Nathan Myrick procured the said Henry Roi to execute his deed of and to the lands so entered by the plaintiff as aforesaid, in the name of said Henry Roi, whereby the said Henry Roi conveyed, with warranty of title, all and singular the said lands to the said Rebecca E. Myrick, her heirs and assigns, which said deed was on the 14th day of January, 1867, duly recorded in the office of the register of deeds of the proper county; that on the third day of January, 1867, the said Nathan Myrick procured the said Joseph Longie to execute, and the said Joseph Longie did execute upon that day, a deed of and to the lands entered by the said plaintiff in the name of the said Joseph Longie as aforesaid (being the same deed whereof a copy is annexed to the complaint in this
157 action), which said deed was duly recorded in the office of the register of deeds of the proper county, on the 17th day of January, 1867: that the said Nathan Myrick directed the conveyance of said land by said Borup and wife to his wife, the said Rebecca, and procured the said deeds from Longie and Roi to be given to the said Rebecca for the purpose of securing the title to the said lands in the said Rebecca, as a gift from him to the said Rebecca; that at and before the execution respectively of the said first two deeds, the said Henry Roi and Joseph Longie had each attained his majority and was of lawful age to execute such deed: that the said Rebecca E. Myrick now holds the title of and to all and singular the said lands so entered by the said plaintiff as aforesaid (except certain undivided interests in and to said lands
158 heretofore conveyed to certain parties as hereinafter stated) without having paid any consideration therefor; that the said defendants on or about the 23d day of January, 1867, by deed in due form, conveyed to one William Branch, his heirs and assigns, the one equal undivided three fourth parts of, in, and to all and singular the said lands, which said deed was duly recorded in the office of the register of deeds of the proper county, on the 28th day of January, 1867.

That a part of said lot one, section eight, town forty-eight, of range sixteen, was on or about the 14th day of June, 1870, surveyed, platted,

and included within the limits of the town of Thompson, and now forms part of said town, as appears by the records in the office of the register of deeds of the proper county; that on or about the 11th day of July, 1870, the said defendants, by quitclaim deed duly executed, conveyed to the Western Land Association, a corporation duly created,
159 and capable of holding and conveying real estate, and to its successors and assigns, all that part of said lot one, section eight that lies north and east of the line of Vermillion street, in the town of Thompson, according to the recorded plat thereof, which said deed was recorded in the office of the register of deeds of the proper county, on the 23d day of July, 1870; that the said Western Land Association, on the 15th day of July, 1870, by its deed of that date, duly executed, conveyed to the said Nathan Myrick, his heirs and assigns, a portion of said lot one, section eight, described as follows, viz: Lots one, five, six, thirteen, eighteen, nineteen, and twenty, in block one; lots twenty-six, twenty-seven, thirty-three, thirty-four, thirty-five, forty-two, forty-three, forty-four, and forty-five, in block five, and lot eight in block three, all in said town of Thompson, according to the recorded plat thereof;
160 and that said last mentioned deed was duly recorded in the proper county, on the 23d day of July, 1870, and that the said Nathan Myrick still holds the title of and to said lots last described in his own name; that said lands ever since the entry thereof have been controlled and managed by the said Nathan Myrick; that as consideration for the lands so conveyed as aforesaid by the said Nathan Myrick and Rebecca E. Myrick to the said William Branch, the said Branch paid to the said Rebecca E. Myrick, with the consent of the said Nathan Myrick, the sum of seven thousand dollars, that said sale of said lands to said Branch was negotiated by said Nathan Myrick; that a portion of the consideration money therefor was paid by said Branch after he had agreed to purchase said lands, and before the execu-
161 tion of said deed to him; that there was paid to the said Joseph Longie and Henry Roi, as a consideration for the execution of the said deeds from them to the said Rebecca E. Myrick, the sum of one hundred dollars, and that the whole expense of obtaining said deeds, including the said one hundred dollars, was the sum of two hundred and fifty dollars, which was paid out of the money so paid by said Branch as last aforesaid.

I further find that at and prior to the date of the said conveyance by said defendants to said Rice, the said Nathan Myrick was in embarrassed circumstances, pecuniarily, and so continued until about the time of the conveyance by said Borup and wife to said Rebecca; that during the same time the said plaintiff was also in embarrassed circumstances, and that there were judgments against him to a consid-
162 erable amount, which could not be collected; that no tender of a conveyance of said lands was ever made by said Myrick to said plaintiff, and no tender of the amount of said note was ever made by said plaintiff to said Nathan Myrick; that shortly after the conveyance by said Magruder to said Myrick, the said Nathan Myrick stated to said plaintiff that he was ready to convey the said lands so entered by said plaintiff upon the 8th day of February, 1859, upon payment of said note, but made no other demand of payment of said note; that subsequently, and prior to the fall of the year 1864, the said Nathan Myrick spoke to the said plaintiff, upon different occasions, in reference to said note and the payment of money thereon, but made no demand of the payment of said note; that some time in the fall of 1864 the said
163 Nathan Myrick did demand payment of said note of said plaintiff;

that said Nathan Myrick did not at that time, nor at any time, offer to convey the whole of the lands so entered in the names of said Longie and Roi, as aforesaid, but did at the time of making said demand offer to convey the one undivided four-fifth part of the said land so entered on the 8th day of February, 1859, by the said plaintiff, as aforesaid, upon payment of said note and interest, claiming at the time to retain the one undivided one-fifth part of said land, for the reason that there had been more delay, expense, and trouble in fixing up the matter than he expected; that the plaintiff insisted upon his right to a conveyance of the whole of said lands, and offered to raise the money and pay said note upon his giving security to perfect the title to said lands; and the said Myrick refused to convey the whole of said
164 lands, and shortly thereafter conveyed said lands to said Borup, as aforesaid; that said plaintiff had made arrangements to raise the money required to be paid for said lands under the said agreement, and up to the time of the said conveyance to the said Borup, was able and ready to pay the same whenever the said Nathan Myrick should be able and ready to secure the title to said lands in said plaintiff, as in said agreement provided.

I further find that said Nathan Myrick has never returned nor offered to return said promissory note prior to the trial of this action, but that on said trial the defendants produced said note in open court, and then and there offered to cancel said note and surrender it to the plaintiff.

All material allegations in the pleadings not herein found to be true I find to be untrue.

165 As a conclusion of law herein, I find that the plaintiff is entitled to judgment herein, directing and decreeing that the defendants convey to the plaintiff, his heirs and assigns, forever, the one undivided one-fourth part of the lands so entered by said plaintiff in the name of said Henry Roi and Joseph Longie, and hereinabove described, and the whole of the said lots hereinabove described, situate in said town of Thompson; and that in case the said defendants should fail to convey the said lands, the decree of this court to be entered herein shall stand in place thereof and be effectual to convey the title to said lands and lots to said plaintiff, his heirs and assigns, forever.

W. WILKEN, *Judge.*

166 *Stipulation.*

It is stipulated that plaintiff's costs and disbursements may be taxed and inserted in the decree in the above case, without further notice, and that the decree shown me may be signed by the judge without prejudice to defendant's right to make a case and move for new trial, if so advised, or to object by motion or appeal to form of decree.

January 14, 1873.

GEO. L. OTIS,
Def't's Att'y.

167 *Judgment.*

This cause came on to be tried at the general May term, A. D. 1871, of said court, upon the issues joined by the complaint and answer, and was tried by said court without a jury, the said parties appearing by their respective counsel; and upon said trial said court found as matter of fact (here follows a recital of the facts found by the court in the foregoing decision).

And said court found, as matter of law, that said plaintiff is entitled to judgment herein, directing and decreeing that said defendants convey

to the plaintiff, his heirs and assigns forever, the lands and lots hereinafter described, and in case said defendants fail to make such conveyance, the decree of this court to be entered and stand in place
168 thereof, and be effectual to convey the title to said lands and lots to said plaintiff, his heirs and assigns forever. And satisfactory evidence having been produced to me showing that said defendants, and each of them, refuse to execute said conveyance or any conveyance as directed,

It is therefore adjudged and decreed, and this court doth hereby adjudge and decree, that the title of and to all and singular those pieces and parcels of land lying and being in the county of Carlton and State of Minnesota, described as follows, to wit:

One equal undivided fourth part of lots one (1), two (2), three (3), and four (4), in section five (5); lots one (1), six (6), and seven (7,) in section six (6); lots one (1), two (2), and three (3), in section eight (8); lots one (1), two, and three (2 and 3), in section nine (9); lots five and six
169 (5 and 6), in section ten (10); lot six (6), in section fifteen (15); lot five (5), in section five (5); lots two (2), three (3), four (4), and five (5), in section six (6); lots four (4), five (5), six (6), and seven (7,) in section eight (8); lots five (5), six (6), seven (7), and eight (8), in section nine (9); all in township forty-eight (48), range sixteen (16) west; also the whole of lots one (1), five (5), six (6), thirteen (13), eighteen (18), nineteen (19), and twenty (20), in block one (1); lots twenty-six (26), twenty-seven (27), thirty-three (33), thirty-four (34), thirty five (35), forty-two (42), forty-three (43), forty-four (44), and forty-five (45), in block five (5); and lot eight (8), in block three (3), all in the town of Thompson, in said county of Carlton, according to the recorded plat thereof on file in the office of the register of deeds within and
170 for said county of Carlton, is hereby passed, conveyed and vested in the said Benjamin Thompson, his heirs and assigns forever, free and clear of and from all right, title, interest, claim, or demand of the said defendants, and each of them, in or to the said premises or any part thereof; and that this decree shall stand in place of a conveyance of said premises to said plaintiff by said defendants, and be effectual to convey the title to the said lands and lots above described to said Benjamin Thompson, his heirs and assigns forever.

It is further ordered and decreed that a certified copy of this decree may be recorded in the office of the register of deeds of said county of Carlton, and that said plaintiff recover of said defendants his costs and disbursements in this cause to be taxed, and have execution therefor.

W. WILKEN,
District Judge.

Attest:

ALBERT ARMSTRONG,
Clerk.

Filed and entered January 23d, 1873.

171 STATE OF MINNESOTA,
Ramsey County, ss:

I, Albert Armstrong, clerk of district court, second judicial district, county of Ramsey, State of Minnesota, do hereby certify and return to the honorable the supreme court of said State that the foregoing are full and true copies of complaint, answer, case, decision and judgment filed and entered in the within-entitled action, as appears from the records & files in my office.

Witness my hand and seal of said court, at S't Paul, this 1st day of April, 1873.

[SEAL.] ALBERT ARMSTRONG,
Clerk.

(Indorsed:) 1602. State of Minnesota, supreme court. Benjamin Thompson, respondent, vs. Nathan Myrick and wife, appellants. Return. Filed April 1st, 1873. Sherwood Hough, clerk. C. K. Davis and Geo. L. Otis, att'ys for appellants.

172 Supreme court, April term, 1873.

STATE OF MINNESOTA:

BENJAMIN THOMPSON, RESPONDENT,
against
NATHAN MYRICK AND REBECCA E. MYRICK.

It is stipulated that the appellants in the above entitled cause shall serve and file brief by May 1st, 1873, and that said respondent shall serve and file brief within thirty days thereafter, and said cause shall stand submitted on said briefs so served and filed.

Appellants to reply, if so advised, in twenty days thereafter, and serve on resp't.

S't Paul, Apr. 14th, '73.

C. K. DAVIS & GEO. L. OTIS,
Att'ys for App't.

E. C. PALMER,
Counsel for Respondent.

(Indorsed:) 1602. State of Minnesota, supreme court. Benjamin Thompson, resp't, vs. N. Myrick et al., appe'ts. Stipulation. Filed April 17th, 1873. Sherwood Hough, clerk.

173 *Syllabus.*

Supreme court. April term, 1873.

BENJAMIN THOMPSON, RESPONDENT,
vs.
NATHAN MYRICK AND WIFE, APPELLANTS.

Ch. 83 of the acts of Congress for 1854 (10 Statutes at Large, 304) authorizes the President to make an exchange with the Sioux half-breeds for their reservation on Lake Pepin, by issuing to them certificates or scrip for a certain amount of land, and provides that "said certificates or scrip may be located upon any of the lands within said reservation * * * or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements."

174 Held, that this provision as to "unoccupied lands" is framed for the protection of occupants, and that the occupant may waive the same so that a valid location of scrip may be made upon lands of which he is in occupation.

Held, further that the clause "upon which they have respectively made improvements," qualifies the words, "other unsurveyed lands," not the words "other unoccupied lands." Gilbert *vs.* Thompson, (14 Minn.

544.) followed and applied. Certain scrippees appointed one defendant N. M., their attorney in fact to locate scrip issued to them under the act of Congress aforesaid.

Held, that the relation thus created did not invalidate an agreement made by such attorney, either before or after the location, to "secure the title" enuring from the location to a third party upon payment
175 of an agreed consideration. If A agrees to "secure the title" to land not owned by him, to be lawfully vested in B, and subsequently A becomes invested with the title to the same, either in his own name or that of some other person holding for him he may be compelled to perform his agreement specifically, upon the same principles and for the same reasons as in case of an ordinary contract to convey lands of which he is the owner.

Consideration of the special facts in this case with reference to the defendants' claim that the plaintiff had abandoned the contract upon which this action is based; that he had failed to perform an indispensable condition precedent on his part: that the enforcement of the contract against defendants would be an inequitable exercise of the discretion of the court; and that the plaintiff has been guilty of such
176 inexcusable laches as to disentitle him to the specific enforcement of the contract upon which this action is based;

This action is founded upon a written contract whereby defendant N. M. bound himself, "upon the location" of certain scrip, to "secure the title" to the land upon which it was located to be lawfully vested in the plaintiff. The scrip was located Feb'y 8th, 1859, and January 17th, 1861. At the time when the agreement was executed the scrippees were minors. The agreement upon its face recognizes their minority and must be taken to have been entered into in view of the same and the consequent obstacles to obtaining title from them before their majority.

Held, that the agreement is not to be construed as an agreement to secure the vesting of the title in the plaintiff immediately upon the location of the scrip, but as an agreement to secure it within a
177 reasonable time after such location; and as there is nothing to show that the defendant N. M. could have obtained title before the scrippees reached their majority, in any legal way, it is to be presumed that he could not, and that, therefore, the period of reasonable time allowed him extended at least to the time of such majority, and that, therefore, the plaintiff's right to bring this action, which is in effect for specific performance, did not accrue until the expiration of such reasonable time, and his acquisition of title in 1866 & 1867, when the scrippees reached majority; and that, therefore, this action, which was brought in 1870, is not barred by the statute of limitations.

178 *Opinion.*

Supreme court, April term, 1873.

BENJAMIN THOMPSON, RESPONDENT,
vs.
NATHAN MYRICK AND WIFE, APPELLANTS.

The conclusion of fact found by the court below, so far as they appear to be important upon this appeal, are as follows, viz:

That on or about the 6th day September, 1858, and prior to that time, the defendant, Nathan Myrick, was attorney in fact, duly constituted,

of Francis Longie and Joseph Longie, his son, then a minor under the age of fourteen years, and of Francis Roi and Henry Roi, his son, then a minor under the age of fourteen years, and was duly authorized to locate certain half-breed scrip issued to said Joseph and Henry
179 in accordance with the provisions of the act of Congress approved July 17th, 1854, entitled "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota belonging to the half-breeds or mixed bloods of the Dakota or Sioux Nation of Indians, &c.," and was desirous of discovering valuable lands situate in the State of Minnesota wherein to locate said scrip, or, in default thereof, of disposing of said half-breed scrip in such manner as to secure the interests of the said owners, in pursuance of the said authority and in discharge of the duty imposed upon him, the said Nathan Myrick, as attorney of the said parties; that, at and prior to September 6th, 1858, the plaintiff had knowledge of, and was, by himself and his agents and employees, in actual possession of certain lands, and had made valuable improvements thereon, and been at great expense thereabout to secure the title thereto in himself; that
180 on or about said 6th day of September, 1858, the plaintiff and defendant, Nathan Myrick, for the purpose of securing the interests of all said parties, entered into an agreement, which after reciting in detail the facts in regard to Myrick's attorneyship as aforesaid, proceeded as follows, viz:

"And whereas the said Nathan Myrick has placed the said scrip and the said powers of attorney in the hands of the said Benjamin Thompson, with a view to the location thereof for the benefit of the said minors:

"Now, this agreement witnesseth that the said Nathan Myrick, in consideration of the premises and of the sum of one dollar to him in hand paid by the said Benjamin Thompson, party of the second part, the receipt whereof is hereby acknowledged, agree with the said party of the second part that he will, upon the location of said scrip, secure the title to the land whereon the same may be located, to be lawfully vested in the said Benjamin Thompson.

181 "And the said Benjamin Thompson, in consideration of the premises and the faithful fulfilment of the said agreement of the said Nathan Myrick, agree with the said party of the first part to pay him the sum of twenty-eight hundred dollars in one year after date, according to the condition of his promissory note to the said Nathan Myrick, bearing even date with this agreement, and to receive the payment of the said sum of twenty-eight hundred dollars upon the land so to be located, as soon as he shall acquire the title to the same as aforesaid, or to secure the same otherwise, upon the acquirement of such title, to the satisfaction of said Nathan Myrick"; that this agreement and the half-breed scrip therein mentioned were delivered to plaintiff by said Myrick, and the plaintiff then and there delivered to Myrick a
182 promissory note in the words and figures following, to wit:

$2,800.] "ST PAUL, *September 6th*, 1858.

"Twelve months after date I promise to pay to Nathan Myrick twenty-eight hundred dollars, without defalcation, for value received.

"BENJAMIN THOMPSON."

That thereupon plaintiff proceeded and did locate said scrip on certain lands known to and occupied by him as aforesaid, a portion of said lands being thus located upon and entered in the name of said Henry

Roi, in part on the 8th day of February, 1859, and in part on the 17th day of January, 1861, and the rest of said lands being thus located upon and entered in the name of Joseph Longie, on said 8th day of February, 1859; that all of said lands were what are known, according to the United States surveys, as lots or fractional pieces, and therefore could not be entered with, and by, said half-breed scrip, except upon
183 condition that plaintiff should pay for the excess over what the said scrip would cover in cash at the rate of $1.25 per acre; and in order to secure the title to said lots and obtain a number of acres equal to the number of acres called for by said scrip, the plaintiff was obliged to, and did, enter said fractional lots and pay for such excess in cash, in consequence whereof said Henry Roi obtained the title to 13.$\frac{40}{100}$ acres of land over and above the amount called for by his said scrip, and the said Joseph Longie obtained the title to 32.$\frac{82}{100}$ acres of land more than was called for by his said scrip; that the plaintiff paid all the fees and expenses of making said entries and in locating said scrip, all of which amounted to five hundred dollars, exclusive of the sum paid for the excess of land aforesaid; that by reason of the said
184 acts of plaintiff, and the payments made by him as aforesaid, the said Henry Roi and the said Joseph Longie acquired the title in fee to all the lands entered in their names respectively, as aforesaid, by grant from the Government of the United States; that at the time of making the agreement aforesaid the said Myrick knew that said Thompson occupied the lands aforesaid and intended to locate said scrip thereon.

That on Dec. 26th, 1866, said Myrick procured said Henry Roi to execute his deed of the lands entered by the plaintiff as aforesaid in said Roi's name, whereby said Roi conveyed with warranty of title all said lands to Rebecca, the wife of said Myrick, her heirs and assigns, which deed was on February 14th, 1867, duly recorded.

That on January 3d, 1867, said Myrick procured the said Joseph Longie to execute a waranty deed to said Rebecca of the lands entered by plaintiff in the name of said Longie, as aforesaid, which deed
185 was also duly recorded on January 17th, 1867; that said Myrick procured the deeds from Roi and Longie to be given to the said Rebecca for the purpose of securing the title to said lands in the said Rebecca as a gift to her from him the said Myrick; that at and before the execution respectfully of the said deeds from Roi and Longie the said Roi and Longie had each attained his majority and was of lawful age to execute the same respectively; that said Rebecca now holds the title to all of said lands (except certain undivided interests, conveyed away as hereinafter stated), without having paid any consideration therefor; that said Myrick and said Rebecca on or about January 23d, 1867, conveyed to William Branch, his heirs and assigns, the equal undivided three fourths part of all of said lands by deed duly recorded January 28th, 1867; that a portion of lot one, section 8, town 48,
186 of range 16 (being part of the lands aforesaid), was laid out as part of the town of Thompson on or about June 14th, 1870; that on or about June 11th, 1870, said Myrick and said Rebecca quitclaimed to the Western Land Association that part of said lot one lying north and east of Vermillion street in said town of Thompson, and the said Western Land Association by its deed of July 15th, 1870, conveyed to said Myrick, his heirs and assigns, seventeen lots, being part of said lot one, in said Thompson, and that said Myrick still holds the title to said seventeen lots in his own name; that as consideration for the lands

conveyed to William Branch as aforesaid, said Branch paid to said Rebecca the sum of seven thousand dollars.

That said lands ever since the entry thereof have been controlled and managed by said Myrick; that the sale to Branch was negoti-
187 ated by said Myrick; that a portion of the consideration money therefor was paid by Branch after he had agreed to purchase said lands and before the execution of the deed to him; that there was paid to said Roi and Longie, as a consideration for their deeds to said Rebecca, the sum of one hundred dollars, and that the whole expense of obtaining said deeds, including said one hundred dollars, was the sum of two hundred and fifty dollars, which was paid out of the money so paid by said Branch.

That at and prior to July, 1861, and until about February, 1866, the plaintiff was in embarrassed circumstances, and there were judgments against him to a considerable amount which could not be collected; that no tender of a conveyance of said land was ever made by Myrick to plaintiff, and no tender of the amount of said note was ever
188 made by said plaintiff to said Myrick; that shortly after January 16th, 1860, Myrick stated to plaintiff that he was ready to convey said lands entered upon the 8th day of February, 1859, upon payment of said note, but made no other demand of payment of said note; that subsequently, and prior to the fall of 1864, Myrick spoke to plaintiff upon different occasions in reference to said note and the payment of money thereon, but made no demand of the payment of said note; that some time in the fall of 1864 Myrick did demand payment of said note of plaintiff; that Myrick did not at that time, nor at any time, offer to convey the whole of said lands so entered in the names of Longie and Roi, as aforesaid, but did at the time of making said demand offer to convey the undivided four-fifths of the said lands so entered
189 on the 8th day of February, 1859, upon payment of said note and interest, claiming at the same time to retain the undivided one-fifth part of said lands, for the reason that there had been more delay, expense, and trouble in fixing up the matter than he expected; that plaintiff insisted upon his right to a conveyance of the whole of said lands, and offered to raise the money and pay said note upon Myrick's giving security to perfect the title to said lands; that Myrick refused to convey the whole of said lands, and shortly afterwards conveyed them to one Borup as security for a loan, upon the payment of which, in February, 1866, Borup conveyed the same to the said Rebecca, wife of said Myrick.

That the plaintiff had made arrangements to raise the money required to be paid for said lands under the agreement aforesaid, and up
190 to the time of the conveyance to Borup was able and ready to pay the same whenever Myrick should be able and ready to secure the title to said lands in said plaintiff, as in said agreement provided; that said Myrick never returned or offered to return said promissory note prior to the trial of this action, but that on said trial defendants (the said Myrick and his wife) produced said note in open court, and then and there offered to cancel the same and surrender it to plaintiff.

As a conclusion of law, the court finds that the plaintiff is entitled to judgment, directing and decreeing that defendants (the said Myrick and the said Rebecca, his wife) convey to plaintiff, his heirs and assigns forever, the one undivided one-fourth part of the lands so entered
191 by plaintiff in the name of Henry Roi and Joseph Longie as aforesaid, and the whole of the seventeen lots aforesaid, and that, in

case said defendants should fail to convey the said lands, the decree of the court shall stand in place of such conveyance, &c. Judgment having been entered accordingly, the defendants appeal.

Defendants' first point is that "the agreement set out in the complaint is void under the act of Congress and the treaty of 1830." The provision of the treaty of 1830 (7 Statutes at Large, 330) referred to is that under which the Lake Pepin reservation was set apart for the half-breeds of the Sioux Nation. The provisions of the act of Congress (10 Statutes at Large, 304) referred to are those authorizing the President to make an exchange with the half-breeds for their reservation by issuing
192 to them certificates or scrip for a certain amount of land, "which said certificates or scrip may be located upon any of the lands within said reservation, * * * * or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements."

It is claimed that, by the terms of the agreement between Myrick and Thompson, the scrip was to be located on land occupied by the latter, and that the agreement was therefore void, as contravening the act of Congress.

The provision by which the scrip was made locatable upon "unoccupied lands" was evidently framed for the protection of occupants. If an occupant saw fit, as Thompson did in this instance, to lay
193 scrip upon land occupied by himself, this would be a waiver of the protection afforded to him by law, an abandonment of his occupancy, and, in effect, a restoration of the premises to the condition of "unoccupied land."

The further claim is made that the agreement is against the act of Congress, because it contemplates the location of scrip upon other land than that "upon which they (the scrippees) have respectively made improvements."

The answer to this is that this clause of the act qualifies the description "other unsurveyed lands," not the description "other unoccupied lands," &c. Such is the construction of the General Land-Office. (1 Lester's Land Laws, 628; 2d ed. 370.)

As to the point that the real object of the contract was to
194 accomplish a transfer of the scrip, we see nothing to distinguish this case in any important respect from Gilbert vs. Thompson (14 Minn., 544).

The second position taken by defendants is that the "agreement is void on common-law grounds by reason of the relations of Myrick to the grantees of the scrip."

As the scrip was made non-assignable by the act of Congress (10 Stat. at Large, 304), and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scrippees was that of an attorney in fact, duly authorized to locate the scrip for them. So far as the location is concerned, there is no ground for supposing that it was not made prudently and for the best interests of Myrick's (the attorney's) principals. So far as appears in this case, Myrick's duty in
his fiduciary relation to the scrippees was at an end when the
195 location was complete.

As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (enuring from the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows,

tend to produce a conflict between Myrick's private interest and his duty to locate the scrip to the best advantage of his principals.

Defendants' third point is that, "by the terms of the contract, the payment of this note by Thompson is a condition precedent to his right to specific performance." The note is now negotiable, and is in the hands of the payee, and there is, therefore, nothing to prevent full inquiry into its consideration. It bears even date with the
196 written contract between Myrick and Thompson, in which it is expressed to have been given in consideration of the matters set out in such contract and of "the faithful fulfilment of the said agreement of the said Nathan Myrick." The note and contract should then be read together as parts of one transaction. So reading them together, and by the light of the facts surrounding their execution, we think it is fairly to be inferred, especially from the provisions as to security, that the intention and expectation of the parties was that the securing of the title of the lands in Thompson was to precede, or at any rate to be contemporaneous with, the payment of the note.

To this extent we think the contract operates to control the precise language of the note, making enforcement depend upon the
197 transfer of the title to Thompson, who would otherwise receive no consideration whatever for his promise to pay. Both parties, as the facts found show, appear to have acted upon this understanding. Myrick appears never to have claimed payment of the note until he supposed himself to be in a condition to convey a valid title to Thompson, and the tenor of his answer in this case clearly shows that Myrick did not expect the note to be paid until he was able to make the conveyance, and that at most he only expected the payment to be made concurrently with the delivery of the necessary deeds. In addition to these considerations, the court below finds that Myrick has already received out of the property, the title to which he had agreed to secure to Thompson, an amount of money considerably exceeding the principal and interest of the note.

198 Defendants' fourth position is that "this is not such a contract as a court of equity will specifically enforce, because it is not for a conveyance of the lands by Myrick, but is for services to be rendered by Myrick in securing a conveyance from Longie and Roi." Myrick's contract is "that he will upon the location of said scrip secure the title to the land whereon the same may be located to be lawfully vested in said Benjamin Thompson."

Plainly the purpose of the contract was to invest Thompson with the title to the lands. Myrick's agreement was not merely to perform services for Thompson in securing the title, but to secure it. If, then, Myrick became invested with the title, either in his own name or the name of some person holding for him, we can conceive of no reason why he should not be compelled to perform specificially his agreement to
199 secure the title to be vested in Thompson, upon the same principles and for the same reasons upon and for which he would be compelled to perform specifically an ordinary contract to convey lands of the title to which he was possessed. If neither Myrick nor any one for him acquired the title, it might be that the plaintiff's sole remedy would have been an action for damages; but as the title has been acquired by or for him, it does not follow that plaintiff's sole remedy is still for damages only.

Defendants' fifth point is that "the admitted and proven facts and the findings of the court raise a conclusive presumption that the contract was abondoned." The question presented by this point is one of

fact, upon which we need remark only that the court below has found against the defendant upon the evidence in the case pro and con,
200 upon an examination of which we are unable to say that the conclusion arrived at is unsupported or erroneous.

Defendant's sixth position is that "to enforce this contract under the circumstances disclosed by the testimony will be an inequitable exercise of the discretion of the court."

The argument in support of this position is in substance and effect that the plaintiff has been wanting in due diligence, and is justly chargeable with laches in not asserting or prosecuting at an earlier date his claim to the lands in question; that he lain by "with a view to see whether the contract would prove a losing or gaining bargain, and, according to the event, either to abandon it or, considering time as nothing, to claim a specific performance"; that he has failed to claim or act under the contract for so long a time as to give the impres-
201 sion that he had waived or abandoned the purchase under such circumstances as to justify the belief that his intention was to perform the contract only in case it suited his interest; that the increase in the value of the lands in this case is entitled to great weight, as tending to show that the plaintiff's delay was not had in good faith, but with the design of taking advantage of the turn in the market, and of throwing the loss on defendant, should the property decline.

The difficulty with this reasoning is that it proceeds upon an assumed state of facts, which there was some evidence in the case to support, but the contrary of which is found by the court. Among the facts found it appears that no valid title to the lands in question was obtained from Roi and Longie (the scrippees) until December 1866, and
202 January 1867. It further appears that Roi and Longie, at the time when the contract between Myrick and Thompson was entered into in September, 1868, were minors under the age of 14 years. There is nothing to show that they reached majority before the time when they executed the deeds to Rebecca E. Myrick, in December, 1866, and January, 1867, and it follows that there is no proof nor presumption that Myrick could in any legal way have obtained title to the lands before the execution of these deeds from Roi and Longie. If so, then, for aught that appears, Myrick was not only never in a condition, but was unable to put himself in a condition, to secure the title to be vested in Thompson, pursuant to the contract, until December, 1866, and Jan'y, 1867. The present action to enforce a specific performance was
203 commenced in 1870. Considering all the circumstances of the case, especially the fact that more than the amount of the plaintiff's note had been realized from the sale of a part of the scripped land to Branch, the lapse of time after defendant was in a position to render the action effectual in affording remedy by specific performance was not, then, so long as justly to subject plaintiff to the charge of inexcusable laches in asserting and prosecuting his claim.

That he did not abandon his claim under the contract, and that Myrick was not laboring under the impression that he had abandoned it, is, we think, a conclusion not difficult to be deduced from the facts found by the court, and hereinbefore mentioned, among which we may specify the several conferences between the parties in relation to the con-
204 veyance of the lands occurring from time to time after the location of the scrip; Myrick's refusal to convey the whole of the land; his claim of one undivided fifth only thereof; his retention of the note until the trial; the plaintiff's claim of his right to a conveyance of the whole, and his offer to pay the note upon receiving security in the

transfer of a valid title to him; plaintiff's arrangements to raise the money to pay the note, and his ability and readiness to pay the same during a period of several years, as found by the court, whenever Myrick should be able and ready to secure him the title as provided in the contract.

Defendant's last position is that "this action is barred by the statute of limitations." Myrick agrees "that he will, upon the location of the said scrip, secure the title to the land, whenever the same may be
205 located, to be lawfully vested in the said Benjamin Thompson."

The scrip was located February 8th, 1859, and January 17th, 1861. Defendant claims that a cause of action accrued to plaintiff immediately upon the location of the scrip, and that the statute began to run from the date of the location, i. e., from January 18th, 1861. We think the limitation, as applicable to this action to compel a specific performance, did not begin to run until Myrick obtained title by the deeds of December, 1866, and January, 1867, being the times when the scrippees reached their majority.

His agreement to secure the vesting of the title "upon the location of the scrip" is not under any fair construction an agreement to secure the same immediately upon the location; the scrippees being minors, this could not be done.

206 But the agreement must be taken to bind him to secure the vesting of the title in a reasonable time after the location of the scrip. The agreement upon its face recognizes the minority of the scrippees, and must be taken to have been entered into in view of such minority, and of the consequent obstacles in the way of obtaining title from them before their majority. As there is nothing to show that Myrick could have obtained title before their majority in any legal manner, it is to be presumed that he could not, and that therefore the period of reasonable time allowed him extended at least to the time of such majority. If this be so, the plaintiff's right to bring the present action (which was brought in November, 1870), did not accrue until the expiration of such reasonable time, and until the acquisition of the title
207 in 1866 and 1867, and is not barred by the statute of limitations.

This disposes of all of the positions taken by defendant, and the result is that the judgment appealed from is affirmed.

BERRY.

(Indorsed:) 1602. State of Minnesota supreme court. Benjamin Thompson, respondent, vs. Nathan Myrick & wife, appellants. Opinion and syllabus. Filed January 6th, 1875. Sherwood Hough, clerk. April term, 1873. Berry.

208 *Respondent's costs and disbursements.*

State of Minnesota, supreme court.

BENJAMIN THOMPSON, RESPONDENT,
against
NATHAN MYRICK AND REBECCA E. MYRICK,
appellants.

I hereby tax the costs and disbursements herein at $53.10 this 25th day of January, A. D. 1875.

Attest:

SHERWOOD HOUGH, *Clerk.*

Statement for judgment.

Costs allowed by statute	$25 00
Printer's fees for printing brief	22 50
Clerk's fees, supreme court	8 00
Filing mandate and docketing transcript	60
	$56 10

STATE OF MINNESOTA, } ss.:

Supreme court.

I, Sherwood Hough, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment
215 in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of Saint Paul, this 25th day of January, A. D. 1875.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

(Indorsed:) 1602. State of Minnesota, supreme court. Benjamin Thompson, respondent, vs. Nathan Myrick & wife, appellants. Transcript of judgment. Filed January 25th, A. D. 1875. Sherwood Hough, clerk. E. C. Palmer, attorney for resp'dt. Page 617.

216 (Indorsed:) No. 1602. State of Minnesota, supreme court. Benjamin Thompson, respondent, against Nathan Myrick & wife, appellants. Judgment roll. Filed January 25th, 1875. Sherwood Hough, clerk. E. C. Palmer, attorney for respondent.

(Indorsed:) State of Minnesota, supreme court. Benjamin Thompson, respondent, vs. Nathan Myrick and wife, appellants. Return to writ of error.

(Indorsement on cover:) No. 147. Nathan Myrick and Rebecca Myrick, plaintiff in error, vs. Benjamin Thompson. Minnesota sup. court. Filed 11th September, 1876.

IN SUPREME COURT UNITED STATES.

NATHAN MYRICK and REBECCA MYRICK,
Plaintiff in Error,

vs.

BENJAMIN THOMPSON,
Defendant in Error.

Error to the Supreme Court of Minnesota.

Brief for Plaintiff in Error

C. K. Davis
Counsel for Plff. in Error.

Supreme Court of the United States.

NATHAN MYRICK and REBECCA MYRICK,
Plaintiffs in Error;

vs.

BENJAMIN THOMPSON,
Defendant in Error.

Error to the Supreme Court of Minnesota.

STATEMENT.

Francis Longie and Joseph Longie, his son, and Francis Roi and Henry Roi, his son, the sons being minors, were half-breeds of the Sioux nation of Indians, and were entitled to certain rights under the treaty of Prairie du Chien, (*U. S. Stat., Vol.* 7, *p.* 330,) and the act of Congress approved July 17, 1854, (*U. S. Stat., Vol.* 10, *p.* 330.)

Nathan Myrick, one of the plaintiffs in error, held a power of attorney from these persons, purporting to authorise him to locate certain half-breed scrip, which had been issued to them under said treaty and statutes, (*p.* 5, *Record.*)

While Myrick occupied this relation to these half-breeds, he entered into a written agreement with Thompson, the defendant in error, (*pp.* 5, 6, *Record,*) reciting that he had placed the scrip in the hands of Thompson, with a view to

the location thereof, for the benefit of said minors, and agreeing with Thompson that he would, upon its location, secure the title to the land wherever the same may be located, to be lawfully vested in Thompson.

In consideration whereof and the faithful fulfillment of this agreement on the part of Myrick, Thompson agreed to pay him $1,800 as soon as he should acquire the title to the land. Thompson was at the time in the actual possession of the lands which were to be affected by this transaction and had improved them, (*fol.* 141, *p.* 38, *Record.*) Scrip (belonging to the minors,) having been delivered to Thompson, he proceeded to locate it upon these lands in 1859 and 1861, paying all the fees and expenses, (*fol.* 14,) by which proceedings these minors became the owners in fee simple of the lands.

In 1866 and 1867 Myrick procured deeds of these lands from the half-breeds to his wife Rebecca Myrick, and by mesne conveyances under her thereafter became himself vested with the title to a portion of them, she still retaining the residue. She was not a *bona fide* purchaser, and her rights are subject to the agreement with Thompson, if that agreement is valid.

In November 1867, Thompson brought this suit in the State court against Myrick and wife for a specific performance of this agreement, (*See Complaint, pp.* 5, 11, *Record.*)

The fact that these Sioux Indians were half-breeds, subject to the treaty and the act of Congress hereinafter cited, and that the transaction throughout was as we have stated is alleged in the complaint itself.

The court of first instance held in favor of Thompson, finding the facts (*p.* 37, *et. seq. record*) and by its final decree vested the title in Thompson as a specific performance of the agreement.

An appeal was taken from this judgment to the Supreme court of Minnesota, which resulted in a final judgment affirming the decree of the court below.

From the judgment of the Supreme court, the Myricks

prayed from the chief justice of that court a writ of error, assigning the following on grounds thereof:

For that the defendant in error and plaintiff below has no ground of action except upon the agreement set out in his complaint and said agreement is void under the act of Congress, approved July 17, 1854, and under the treaty of 1830, made at Prairie due Chien, (*See. U. S. Stat vol.* 7 *of p.* 330, *and vol* 10, *p.* 304. *p.* 2, *Record.*)

The writ was duly allowed by the chief justice. (*p.* 3, *Record.*)

The error assigned arises by averment, (*See complaint fols.* 14 *aud* 22, *Record*); by testimony, (*see fols.* 65, 66, 72, 73, 86, 87 and 88 *Record*); by the finding of fact of the court of first instance (*folios* 140 and 146 *Record.*) It was necessarily and actually overruled in the decree of that court, (*folio* 167, *Record,*) and it was expressly held against the plaintiff in error by the Supreme court of Minnesota. (*Folios* 192 and 194, *Record.*)

ERROR ASSIGNED.

The defendant in error and plaintiff below has no ground of action except upon the agreement set out in his complaint and said agreement is void under the act of Congress, approved July 17, 1854, and under the treaty of 1830, made at *Prairie du Chien.* Nevertheless the court below has decided that the said agreement is not void under said act and treaty.

I.

THE AGREEMENT SET OUT IN THE COMPLAINT AND ENFORCED BY THE DECREE, IS VOID UNDER THE ACT OF CONGRESS, AND THE TREATY OF 1830.

U. S. Stat. at Large, Vol. 10, *p.* 304.
U. S. Stat. at Large, Vol. 7, *p.* 330.

It appears from the complaint that Longie and Roi, were half-breeds of the Dakota or Sioux nation of Indians, refer-

red to in the act of Congress, approved July 17, 1854, (*U. S. Stat. Vol.* 10, *p.* 304), and the treaty of Prairie du Chien (*U. S. Stat. Vol.* 7, *p.* 330.

Article IX of the treaty provides that the half-breeds shall hold the land bestowed upon them "by the same title, and in the same manner, that other Indian titles are held." The act of 1854 authorizes the President to exchange with the half-breeds their lands, by issuing to them, on their relinquishment to the United States of their interest in the tract ceded, certificates for the same amount of land to which each individual would be entitled on a division of the tract *pro rata*, which said certificates may be located on any of the lands within the reservation not occupied by actual and *bona fide* settlers of the half-breeds, or other persons who have gone into the Territory by authority of law, or upon any other unoccupied lands, subject to pre-emption, or upon any other unsurveyed lands, not reserved by the government, *upon which they have respectively made improvements. The act also provides that no transfer or conveyance of any of said certificates or scrip shall be valid.*

This agreement upon its face is an attempt to do indirectly what cannot be lawfully done directly. It is undertaken to give the defendant in error the benefit of this scrip, and it covenants that it shall be laid on lands which Thompson, and not the half-breed, has occupied and improved.—(Fol. 16, Record.)

This mode of laying the scrip is prohibited by section 1 of the act of 1854 (vol. 10, U. S. Stat. p. 304.) The scrip can be located by the half-breeds "upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government; *upon which they have respectively made improve ments*"

This agreement thus stipulates for a plain violation of law by both of the contracting parties. Before Myrick's obligation to procure the title to Thompson becomes operative, this scrip is to be located, not upon lands which have been

improved by the half-breeds, but upon lands not occupied, but which were in the possession of Thompson—lands which he and not the half breeds had improved.—(Folio 15, Record.)

The intent also to violate the prohibition of the act in regard to the transfer of the scrip is apparent upon the face of the contract. The agreement is astutely drawn with a view to secure indirectly just what the act had forbidden.

The complaint, folio 2, states that Myrick "was desirous of discovering valuable lands * * * whereon to locate said half-breed scrip, or, in default thereof, of disposing of said half-breed scrip," "but was unable to find such lands, or locate said half-breed scrip, except as hereinafter stated."

The complaint then states that at the date of the agreement Thompson "was in actual possession of the lands hereinafter described, and had made valuable improvements thereon, and had been at great expense thereabout," not for the benefit or as the agent of Longie or Roi, but "in order to secure title thereto in himself, the plaintiff."

The real object of this contract was, as we have stated, to secure the transfer of the scrip itself. This is apparent, both from the complaint and the agreement, and from the testimony.

These papers demonstrate that the object of the transaction was to transfer to Thompson the scrip itself, and that it was in fact transferred to him.

Subsequent investiture of the title to the land in Myrick does not make this contract valid. If it was void at the time when it was executed it cannot be made valid by a change in circumstances.

Supreme Court of the United States.

No. 147.

NATHAN MYRICK AND REBECCA MYRICK,
Plaintiffs in Error,

vs.

BENJAMIN THOMPSON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

E. C. PALMER,
Counsel for Defendant in Error.

Pioneer Press.

Supreme Court of the United States.

No. 147.

NATHAN MYRICK AND REBECCA MYRICK,
Plaintiffs in Error,

vs.

BENJAMIN THOMPSON,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

E. C. PALMER, Counsel for Defendant in Error.

STATEMENT OF THE CASE.

The action was for specific performance, and was brought upon the following instrument:

"Articles of agreement made and concluded this sixth day of September, 1858, between Nathan Myrick, of St. Paul,

Minnesota, of the first part, and Benjamin Thompson, of the same place, of the second part. Whereas, the said Nathan Myrick is the attorney-in-fact of said Francis Longie, and Joseph Longie, his son, (a minor under the age of fourteen years,) by virtue of certain powers of attorney, duly executed by the said Francis Longie, on behalf of himself and his said son, dated July 1, 1857, authorizing the said Nathan Myrick, among other things, to locate certain half-breed scrip, issued by the Commissioners of Indian Affairs of the United States, in accordance with the provisions of the act of Congress, approved July 17th, 1854, entitled, "An act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesoto, belonging to the half-breeds or mixed bloods of the Dakota or Sioux Nation of Indians, and for other purposes," to the said Joseph Longie, numbered 355 B, C, D, and E, for 440 acres; and also is the attorney-in-fact of Francis Roi, and Henry Roi, (his son, a minor under the age of fourteen years,) by virtue of a certain power of attorney, duly executed by the said Francis Roi, on behalf of himself and his said son, dated July 20th, 1857, authorizing the said Nathan Myrick, among other things, to locate certain other half-breed scrip, issued by the commissioners aforesaid, in accordance with the act aforesaid, to the said Henry Roi, numbered 481 A, B, C, D, and E, for 480 acres.

And whereas, the said Nathan Myrick has placed the said scrip and the said powers of attorney in the hands of the said Benjamin Thompson, with a view to the location thereof for the benefit of said minors. Now this agreement witnesseth, that the said Nathan Myrick, in consideration of the premises, and of the sum of one dollar to him in hand paid by the said Benjamin Thompson, party of the second party, the receipt

whereof is hereby acknowledged, agrees with the said party of the second part, that he will, upon the location of the said scrip, secure the title to the land whereon the same may be located, to be lawfully vested in the said Benjamin Thompson.

And the said Benjamin Thompson, in consideration of the premises, and the faithful fulfillment of the said agreement of the said Nathan Myrick, agrees with the said party of the first part, to pay him the sum of twenty-eight hundred dollars, in one year after date, according to the condition of his promissory note to the said Nathan Myrick, bearing even date with this agreement, and to secure the payment of the said sum of twenty-eight hundred dollars upon the land so to be located, as soon as he shall acquire the title to the same as aforesaid, or to secure the same otherwise upon the acquirement of such title, to the satisfaction of said Nathan Myrick.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

NATHAN MYRICK, [SEAL.]
BENJAMIN THOMPSON, [SEAL.]

Signed, sealed and delivered in presence of
WM. HOLLINSHEAD.

The defense set up was—

1. Abandonment of the contract and all claim under it.
2. The statute of limitations.

No question was raised on the pleadings or in the trial court, that the said contract was void, as contravening any treaty or act of Congress, but a trial was had on the merits, and the facts were all found in favor of the plaintiff below—defendant

in error here. Judgment was entered, from which an appeal was taken to the Supreme Court of Minnesota. In the brief of appellant in that court, the point was made for the first time, which is made the basis for invoking the jurisdiction of this court.

We think no federal question can be properly raised in such an action, or upon this record.

The case shows that Myrick acquired the legal title to the land in controversy, from the patentees, after the scrip was located and the parties had arrived at full age. This title he transferred to his wife in fraud of Thompson's rights.

He defended not on the ground that he and Thompson had unlawfully combined to make an illegal location of the scrip, and then procure a fraudulent transfer of the land for their benefit, (which he could not have established had he tried) but on the defenses set out in the answer, to-wit, abandonment of the contract and the statute of limitations.

POINTS, AUUHORITIES AND ARGUMENT OF DEFENDANT IN ERROR.

I.

NO QUESTION CAN ARISE IN THIS CASE UNDER THE ACT OF CONGRESS OR THE PROVISIONS OF ANY TREATY.

Garrell vs. Lyle, 27 *Ala.*
Jackson vs. Henman, 10 *John*, 291.
Van Orman vs. Phelps, 9 *Barb.*, 500.
Barbor vs. Harris, 15 *Wendell*, 615.
Love vs. Gates, 7 *Der & Butt*, 363.
Murphy vs. Burnett, 2 *Murphy*, 251.

Gaines vs. New Orleans, 6 *Wall*, 715.

Both parties claim under the same grantors. In complaint and answer, the proper location of the scrip and the investiture of Roi & Langie with the title under the location, is conceded. The plaintiffs in error, are therefore estopped from urging as a defence that the scrip was improperly located, or that such was the object of the contract. They must stand by the defenses set out in their answer.

Douglas vs. Scott, 5 *Ohio*, 199.

Elwood vs. Lennon's Lessee, 27 *Md.* 200.

II.

THE QUESTION OF LAWFUL LOCATION IS A QUESTION SOLELY BETWEEN THE UNITED STATES AND THE GRANTEES OF THE SCRIP.

Woodbury vs. Dorman, 15 *Minn.*, 338.

Snow vs. Flunnery, 10 *Iowa*, 319.

That the government raises no such question is shown on folios 156, 157 of the Record, wherein it appears that patents have been duly issued to Roi & Langie under these locations of their scrip for all the lands in controversy. The plaintiffs in error claiming title under the same location are estopped to dispute its validity, as we have previously shown.

III.

THE CONTRACT DOES NOT STIPULATE FOR A VIOLATION OF LAW AS TO LOCATING THE SCRIP.

Thompson was in the occupancy of the lands and could waive his rights if he chose in favor of the owners of the scrip.

The provision in the act of 1854, cited by appellants' counsel, is designed to protect those occupying lands locatable with scrip,

but if such prior right is not insisted upon, the location is good.

Moreover, the case does not show that these lands were *unsurveyed* lands upon which they (the half breeds) were required to have made improvements—but does show that the lands were subject to pre-emption, and therefore did not require any improvement as a condition to locating the scrip.

IV.

THE CONTRACT DECLARED ON IS NOT PROHIBITED BY ANY ACT OF CONGRESS OR THE PROVISIONS OF ANY TREATY.

Camp vs. Smith, 2 *Minn.*, 174.
Ammon vs. Alexander, 10 *Page*, 511.
Sedgwick vs. Staunton, 4 *Kernan*, 289.
Johnson vs. Rickett, 5 *Cal.* 218.

The contract does not touch or affect the title to scrip or land. By it Thompson acquired no title to either scrip or land as against anybody. When he had located the scrip and thereby vested the title to the land in Roi & Langie, he then became entitled to call on Myrick to fulfill his part of the contract; and from that time all Myrick's acts in procuring title must be considered as done for Thompson's benefit, and when he obtained title he held it as the trustee of Thompson, and can be compelled to transfer it to his *cestui que trust.*

The act of Congress, quoted by appellants' counsel, does not prohibit such a transaction. That act makes the scrip non-assignable, but after location of the scrip, and issuance of the patent, there is not, and could not be, any clog on alienation of the land. Such a restriction, if attempted, would be null. The moment the title in fee passes from the United States the land comes under the exclusive dominion of the State in which

it lies, and its owner, if of full age, has an unrestricted right to deal with it as he pleases.

Gilbert vs. Thompson, 14 *Minn.*, 544.

In this case the contract does not bind Myrick to any act until the half breeds acquire full title. Then, when they possess title, and may transfer it, he is to procure their title to be vested in Thompson. If it is lawful for A to contract to procure the title of B, to certain real estate, to be vested in C, then is this contract valid. And the fraud of A, in procuring such title, if there was fraud, cannot be pleaded by him in bar of a decree for specific performance.

Facklar vs. Ford, 24 *How.*, 322.

E. C. PALMER,
Counsel for Deft. in Error.